TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 52

HARRY A. HAHN, PETITIONER,

vs.

ROSS ISLAND SAND & GRAVEL CO.,
A CORPORATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

PETITION FOR CERTIORARI FILED APRIL 21, 1958
CERTIORARI GRANTED JUNE 2, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 225544

HARRY A. HAHN, Plaintiff,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Defendant.

SECOND AMENDED COMPLAINT (Action at Law for Personal Injuries)

Plaintiff complains of defendant, and for cause of action alleges:

I

At all times relevant herein defendant, Ross Island Sand & Gravel Co., was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is engaged in the business of operating a sand and gravel plant, with its principal place of business at 4129 S.E. McLoughlin Boulevard, in the City of Portland, County of Multnomah, and State of Oregon.

II

At all times relevant herein, there were, and now are, safety regulations duly and legally promulgated and adopted by the State of Oregon Industrial Accident Commission, effective June 15, 1947, which safety regulations are embodied in the "Basic Safety Code of the State of Oregon," Part II, Chapter IV of which relates to fixed ladders and provides, in part, as follows:

"4.5 Fixed ladders shall be firmly secured in place.

• • •

"4.8 Fastenings shall be made to the permanent structure either by building in or by through bolts, rivets, or expansion bolts grouted, leaded, or equivalent."

Said regulations had, and now have, the force and effect of law.

III

On and before March 23, 1955, plaintiff was employed by defendant as an "oiler" at defendant's sand and gravel [fol. 4] plant referred to above; in the performance of his duties as such employee, plaintiff was required to, and did, oil, service and operate power driven machinery in connection with dredging, loading and unloading operations in the course of defendant's business, which work, and the work which plaintiff was performing at, and immediately prior to, the time he was injured as hereinafter alleged, involved risk and danger to plaintiff and to other employees of defendant.

IV

On or about March 23, 1955, at approximately 8:00 p.m., defendant was loading, and was in charge of and responsible for the loading of, a wooden "hopper", used for loading sand and gravel into trucks, onto a barge owned by defendant. The "hopper" was picked up by a crane and was set down on the barge on which it was being loaded whereupon plaintiff, pursuant to orders from defendant, and within the course of plaintiff's employment, attempted to climb a wooden ladder fastened to the side of the "hopper" in order to free it from the crane. The ladder was in two sections such that it was necessary for plaintiff, in order to reach the top of the "hopper" to perform his function in the above-described operation, to climb one section of the ladder to a cross beam one-half way up the "hopper", walk along the cross beam to the second section of the ladder and ascend it to the top of the "hopper." When plaintiff neared the top of the second section of the ladder, it broke away from the frame of the "hopper," to which it was attached, causing plaintiff to plummet over backwards and to fall a distance of approximately 12 feet; plaintiff landed on his back with great force and violence on sand which had previously been loaded on the barge, with the ladder falling on top of him, thereby

proximately causing the injuries and damage to plaintiff hereinafter set forth.

V

Plaintiff's fall and the injuries and damage to him resulting therefrom were the proximate result of, and were [fol. 5] proximately caused by, the carelessness, recklessness and negligence of defendant and the failure of defendant to use every device, care and precaution which it was practicable for defendant to use for the protection and safety of the life and limb of defendant's employees, including plaintiff, without impairing the efficiency of said "hopper", in the following particulars:

(a) In ordering and directing plaintiff to climb up on said "hopper" at a time when the wooden frame thereof, to which said upper section of the ladder was attached, was rotten, decayed and structurally weak and defective.

(b) In failing to see that all wood and other material components of the "hopper" were carefully inspected and tested so as to detect any defects.

(c) In failing to firmly secure upper section of the ladder to the "hopper" by use of through bolts or equivalent means.

(d) In failing to warn plaintiff of the defective condition of the "hopper."

(e) In failing to provide plaintiff with a safe place in which to work.

(f) In failing to use every device, care and precaution for the protection and safety of the life and limb of plaintiff which it was practicable to use without impairing the efficiency of said "hopper" in that it was practicable, and would not have impaired the efficiency of the "hopper," to have replaced the rotten, decayed and structurally weak and defective wooden parts thereof with wood that was not rotten, decayed or structurally weak and defective or with metal, and to have securely fastened said ladder to the

structurally sound portions of the "hopper" by the use of through bolts or equivalent means.

VI

As a direct and proximate result of said accident, and of the negligence of defendant as hereinabove alleged, plaintiff has suffered the following permanent injuries:

[fol. 6] (a) Compression fracture of the first lumbar vertebra;

(b) Compression fracture of the twelfth dorsal vertebra;

(c) Aggravation of a pre-existing arthritic condition;

(d) Strain of the neck;

(e) Multiple bruises and contusions of the right arm. Plaintiff has undergone great physical and mental pain and suffering, and will continue to so suffer in the future. Plaintiff has been, and is, damaged generally in the sum of $50,000.00.

VII

As a direct and proximate result of said injuries, plaintiff has been rendered totally disabled and will be so disabled for an indefinite period of time in the future, and has lost wages, to date, in the amount of approximately $3,900.00, and will continue to lose wages in the future; plaintiff has necessarily incurred medical expenses for treatment by doctors, for x-rays and a hyperextension brace, in the reasonable sum of $342.00, and will necessarily incur additional medical expenses in the future.

VIII

Immediately prior to said accident, plaintiff was 57 years old, and was a healthy, robust, able-bodied man capable of engaging in manual labor; plaintiff had a life expectancy under the Commissioner's 1941 Standard Ordinary Mortality Table of 16.43 years. As a direct and proximate result of said accident, plaintiff's ability to work and perform labor has been permanently impaired.

Wherefore, plaintiff demands judgment against defendant in the sum of $50,000.00 general damages, the sum of $5242.00 special damages, and for his costs and disbursements incurred herein.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 7] *Duly sworn to by Harry A. Hahn, jurat omitted in printing.*

Plaintiff requests a jury trial.

John H. Buttler, of Attorneys for Plaintiff.

Acknowledgment of service (omitted in printing).

[fol. 8]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

SECOND AMENDED ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Comes now the defendant and for second amended answer to plaintiff's second amended complaint, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I, and that there were and now are safety regulations duly and legally promulgated and adopted by the State of Oregon Industrial Accident Commission effective June 15, 1947 which safety regulations are embodied in the "basic safety code of the State of Oregon",

"4.5 Fixed ladders shall be firmly secured in place.

* * * * * * *

"4.8 Fastenings shall be made to the permanent structure either by building in or by through bolts, rivets, or expansion bolts grouted, leaded, or equivalent."

but the defendant does not admit that said safety regulations are applicable to the matter here in question.

II.

The defendant further admits that on March 23, 1955, the plaintiff was employed by the defendant as an oiler at defendant's sand and gravel plant and admits that on March 23, 1955 a wooden hopper was to be removed from a barge and in the course of said removal the plaintiff was climbing a ladder on the side of said hopper and fell and incurred some injury although the defendant denies the specific allegations of injuries made by the plaintiff.

[fol. 8A] III.

The defendant further admits that the plaintiff was 57 years old and appeared capable of engaging in manual labor but the defendant denies each and every other allegation of plaintiff's second amended complaint and the whole thereof.

For a Further and Affirmative Answer and Defense the defendant alleges as follows:

I.

That on March 23, 1955 at the time the plaintiff was injured the plaintiff was employed by the defendant and was working on a barge; that the plaintiff at the time of his injury was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

II.

That said barge was upon, and plaintiff's injuries occurred upon a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island.

III.

That the defendant has secured the payment of compensation under the Longshoremen and Harbor Workers' Compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act.

IV.

That the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred as alleged in plaintiff's second amended complaint is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act.

Wherefore, the defendant prays for judgment herein.

Mautz, Souther, Spaulding, Denecke & Kinsey,
Attorneys for Defendant.

[fol. 9] Acknowledgment of service (omitted in printing).

[fol. 10]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

REPLY TO SECOND AMENDED ANSWER TO SECOND AMENDED COMPLAINT

Comes now plaintiff and for his reply to defendant's further and affirmative answer and defense contained in its second amended answer to plaintiff's Second Amended Complaint, admits, denies and alleges as follows:

I

Answering paragraph I, plaintiff admits the same.

II

Plaintiff denies each and every other allegation, matter and thing therein contained and the whole thereof.

Wherefore, plaintiff prays for judgment as set forth in his Second Amended Complaint.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 11]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

Bill of Exceptions

Plaintiff, Harry A. Hahn, tenders this, his bill of exceptions herein, as follows:

Be It Remembered that the above-entitled action came on regularly for trial in the above-entitled court on the 8th day of February, 1956, before the Honorable James R. Bain, Judge of the above-entitled court, plaintiff appearing in person and by Dwight L. Schwab and John H. Buttler, of Cake, Jaureguy & Hardy, his attorneys, and the defendant appearing by one of its officers and by Arno H. Denecke, of Mautz, Souther, Spaulding, Denecke & Kinsey, its attorneys. A jury was duly impanelled and sworn to try the action, whereupon the trial proceeded, and with adjournment from time to time continued to and including the 10th day of February, 1956.

There is attached hereto and made a part hereof to all intents and purposes whatsoever a transcript of all of the evidence which was offered, excluded or received at the trial, all motions, objections, stipulations and exceptions made during the trial, all rulings and comments of the court made during the trial, but said transcript of the proceedings does not include any instructions given, or requested to be given, to the jury by the court, to the giving of which, or the failing to give which, instructions no exceptions were taken by either party. Also attached hereto are all of the exhibits referred to in said transcript of proceedings, and said exhibits are all of the exhibits offered, excluded or received in evidence, and they are by [fol. 12] this reference thereto incorporated herein and made a part hereof.

Said transcript of proceedings does not expressly state that each of the parties stipulated to the statements dictated into the record by Mr. Buttler and appearing on pages 7, 96 and 97 of the transcript of proceedings; in fact,

however, counsel for the respective parties stipulated to all of said statements. Said transcript of proceedings does not indicate that Defendant's Exhibit 1 and plaintiff's Exhibits A, B, C and D were received in evidence; in fact, however, each and every one of said exhibits was offered into evidence and admitted and received without objection.

After the parties rested their cases, on the 10th day of February, 1956, defendant moved for a directed verdict in its favor; the court was of the opinion that the motion should be granted, but, at the request of counsel for plaintiff, and pursuant to ORS 18.140, decided to submit the case to the jury with leave to the defendant to move for judgment in its favor if the verdict was otherwise than would have been directed. Said motions and the court's rulings thereon were as follows:

> Mr. Denecke: The defendant moves the Court to direct a verdict for the defendant on the grounds and for the reason that the evidence in the case shows that the plaintiff was injured on the navigable waters of the United States and that the plaintiff is otherwise within the purview of the Longshoremen and Harbor Workers' Compensation Act by reason of the fact that he was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons, and that the defendant had secured the payment of compensation under the Longshoremen and Harbor Workers' Act in a manner provided for in said Act, and that said Act provides that the sole and exclusive liability of the defendant for any injuries which the plaintiff may have incurred is that liability provided for under the Longshoremen and Harbor Workers' Compensation Act; and furthermore that the Compensation Act of the State of Oregon is not applicable because of the work in which the plaintiff was engaged at the time and because the injury occurred upon the navigable waters of the United States.
>
> • • • • • • •
>
> "The Court: Gentlemen, after listening to your arguments and reading your authorities and studying them some more, and listening to the testimony in this case,

[fol. 13] the Court is of the opinion that this accident happened on navigable waters of the Willamette River.

"The Court is further of the opinion that the uncontradicted testimony shows that the defendant Ross Island Sand & Gravel Company was engaged in interstate commerce, and I fail to see where it comes within the twilight zone following the Martinson case. I think Mr. Hahn's remedy is under the Longshoremen and Harbor Workers' Act, so I am going to allow the motion for directed verdict and allow an exception.

"Mr. Schwab: Your Honor, we would like to have the matter submitted to the jury under the rule so we can get a jury determination.

"The Court: I will allow them to present the case to the jury with the understanding if the verdict comes in for the plaintiff I will set it aside and grant a verdict for the defendant, and allow an exception."

After counsel for both parties had made their respective arguments to the jury and the court had instructed the jury as to the law of the case, the jury retired to deliberate, and on the 10th day of February, 1956, the jury returned into open court its verdict, as follows:

VERDICT—February 10, 1956

"We, the jury, duly impanelled and sworn to well and truly try the above-entitled cause, do find our verdict in favor of the plaintiff, Harry A. Hahn, and against the defendant, Ross Island Sand & Gravel Co., a corporation, and assess plaintiff's general damages in the sum of $34,000.00 and his special damages in the sum of $4,242.00.

"Dated this 10 day of February, 1956.

"Marion J. Siders
Foreman"'

and said verdict was received as and for the verdict of the jury in this cause and was filed herein.

* * * * * * *

[fol. 14]

"In the Circuit Court of the State of Oregon
For the County of Multnomah

Motion for Judgment—Filed February 13, 1956

"Comes now the defendant Ross Island Sand & Gravel Co., a corporation, and moves the Court for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, in the event that the Court determines that there was a valid verdict duly rendered and entered on the ground and for the reason that defendant's timely motion for a directed verdict for the defendant was granted by the Court and ought to be granted but the Court, at the request of the plaintiff, submitted the case to the jury with leave to the defendant to move for a judgment in defendant's favor if the verdict was otherwise then as would have been and was directed.

"In addition to the grounds and reasons above stated this motion is based upon the further grounds and reasons as were stated at the time defendant made its motion for a directed verdict and upon which grounds and reasons the Court granted the defendant's motion for a directed verdict. such further grounds and reasons being that at the time the plaintiff was injured he was upon a barge and said barge was upon and the plaintiff's injuries occurred upon the navigable waters of the United States, that is a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island. Plaintiff at the time of his injury was not a master, member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net; that the defendant at the time of the injury had secured the payment of compensation under the Longshoremen & Harbor Workers' compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act; that the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred was alleged in plaintiff's second amended complaint

is that liability provided for under the said Longshoremen & Harbor Workers' Compensation Act.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY
Attorneys for Defendant"

* * * * * * *

"IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

[Title omitted]

JUDGMENT—February 14, 1956

[fol. 15] "The above entitled cause came on regularly for trial in the above entitled court on the 8th day of February, 1956, before the undersigned Judge of said Court, plaintiff appearing in person and by his attorneys, Dwight L. Schwab and John H. Buttler of Cake, Jaureguy & Hardy, and defendant appearing by one of its officers and by its attorney Arno H. Denecke of Mautz, Souther, Spaulding, Denecke and Kinsey; a jury was duly empanelled and sworn; counsel for the respective parties made their opening statements to the jury; evidence was introduced by the respective parties, and stipulations of fact were made by the respective parties, and after the respective parties had rested their cases, counsel argued the cause to the jury; thereupon the jury was instructed by the Court as to the law of the case, and thereafter, on the 10th day of February, 1956, the jury retired to deliberate on its verdict; and thereafter, on the 10th day of February, 1956, the jury returned its verdict in open court, James R. Bain, one of the Judges of the above entitled Court presiding, said verdict being as follows:

"We, the jury, duly empanelled and sworn to well and truly try the above entitled cause, do find our verdict in favor of the plaintiff, Harry A. Hahn, and against the defendant, Ross Island Sand and Gravel Co., a corporation, and assess plaintiffs general damages in the sum of $34,000 and his special damages in the sum of $4,242.

"Dated this 10th day of February, 1956.

"Signed—MARION J. SIDERS
Foreman."

"Now, Therefore, based upon said verdict of the jury,

"It Is Hereby Ordered and Adjudged that the plaintiff have and recover of and from the defendant, Ross Island Sand & Gravel Co., a corporation, the sum of $38,242.00 and for his costs and disbursements incurred herein, taxed in the sum of $.....; and that execution issue therefor.

"Dated this 14th day of February, 1956.

"James R. Bain
Judge"

and thereafter plaintiff's cost bill in the amount of $63.19 was duly served, filed and allowed.

Among the proceedings thereafter had to which objections were made and exceptions taken by plaintiff and allowed by the Court, together with sufficient explanatory matter to explain the rulings and errors complained of, were the following:

Exception No. 1

On the 15th day of February, 1956, defendant served and filed its Motion for Order Setting Aside Verdict and Judgment and for Judgment for Defendant Notwithstanding the Jury Verdict as follows:

[fol. 16]

"In the Circuit Court of the State of Oregon
For the County of Multnomah

Motion for Order Setting Aside Verdict and Judgment and for Judgment for Defendant—Filed February 15, 1956

"Comes now the defendant Ross Island Sand & Gravel Co., a corporation, and moves the Court for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, in the event that the Court determines that there was a valid verdict duly rendered and entered, and setting aside the judgment entered thereon in favor of the plaintiff and against the defendant, on the ground and for the reason that defendant's timely motion for a directed verdict for the defendant was granted by the Court and ought to be

granted and should have been granted, but the Court, at the request of the plaintiff, submitted the case to the jury with leave to the defendant, to move for a judgment in defendant's favor if the verdict was otherwise then as would have been and was directed.

"In addition to the grounds and reasons above stated this motion is based upon the further grounds and reasons, as were stated at the time defendant made its motion for a directed verdict and upon which grounds and reasons the Court granted the defendant's motion for a directed verdict, that at the time the plaintiff was injured he was upon a barge and said barge was upon and the plaintiff's injuries occurred upon the navigable waters of the United States, that is a portion of the Willamette River in the State of Oregon lying between what is known as Ross Island and Hardtack Island. Plaintiff at the time of his injury was not a master, member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net; that the defendant at the time of the injury had secured the payment of compensation under the Longshoremen & Harbor Workers' Compensation Act of the United States (33 U.S.C.A. Sec. 890) in a manner provided for in said Act; that the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred was alleged in plaintiff's second amended complaint is that liability provided for under the said Longshoremen & Harbor Workers' Compensation Act.

"MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY
Attorneys for Defendant"

* * * * * * *

"IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 225-544

"HARRY A. HAHN, Plaintiff,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Defendant.

JUDGMENT—February 16, 1956

[fol. 17] "This matter came before the Court on the motion of the defendant for an order setting aside the verdict rendered in the above entitled action in favor of the plaintiff and against the defendant, and setting aside the judgment thereon and for a judgment in favor of the defendant; and

"The Court having granted defendant's timely motion for a directed verdict for the defendant, but at the request of the plaintiff, having submitted the case to the jury with leave to the defendant to move for a judgment in his favor if the verdict is otherwise than would have been directed, and the verdict being otherwise than was directed by the Court and the Court hearing further argument and finding that the plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901, et seq), and the Court being fully advised in the premises, therefore:

"IT IS CONSIDERED, ORDERED AND ADJUDGED that the motion of the defendant for an order setting aside the verdict rendered and entered in the above entitled action in favor of the plaintiff and against the defendant, for an order setting aside the judgment entered thereon, and for a judgment in favor of the defendant be and the same is hereby granted; and the verdict and judgment in favor of the plaintiff and against the defendant be and hereby are set aside and held for naught; all on the ground that the plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901, et seq.); and

"IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED on said ground that the plaintiff take nothing against the defendant Ross Island Sand & Gravel Co. by reason of this action and that the defendant Ross Island Sand & Gravel Co. have judgment against the plaintiff Harry A. Hahn and that the defendant have judgment against the plaintiff for its costs and disbursements incurred herein taxed at $..... and that execution issue therefor.

"Dated this 16 day of February, 1956.

"JAMES R. BAIN
Judge"

The foregoing bill of exceptions is hereby presented and tendered by the plaintiff on this 13th day of April, 1956, with the request that it be settled, approved and allowed by the Court as the bill of exceptions herein.

Cake, Jaureguy & Hardy, Attorneys for Plaintiff.

[fol. 18]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 225-544

Harry A. Hahn, Plaintiff,

vs.

Ross Island Sand & Gravel Co.,
a corporation, Defendant.

Transcript of Proceedings—February 8, 1956

Be It Remembered That the above-entitled cause came regularly on for trial before the Honorable James R. Bain, Judge presiding in Department No. 3 of the above-entitled Court, and a jury, commencing on Wednesday, February 8, 1956, at the hour of 9:30 o'clock A. M.

APPEARANCES:

Mr. Dwight L. Schwab and Mr. John H. Butler, of attorneys for plaintiff.

Mr. Arno H. Denecke, of attorneys for defendant.

(Whereupon, prior to the impaneling of the jury, the following proceedings were had in chambers:)

[fol. 19] Proceedings

The Court: I think the changes in the pleadings, as far as the Second Amended Complaint is concerned, it's just changes in the injuries and damages; isn't that right?

Mr. Buttler: Yes. It alleges in addition to what was in the prior addition on page 4, it alleges a compression fracture of the twelfth dorsal vertebra, which was not included in the first complaint. That was an oversight, it just alleges the first lumbar, and we raise the amount of the general damages.

The Court: $342. Any objections?

Mr. Denecke: No objections.

The Court: It will be received and filed. How is your answer; did you file an amended answer?

Mr. Denecke: Yes, but I am going into it a little more on the Longshoremen and Harbor workers Act.

The Court: Any objections?

Mr. Schwab: We have no filing of it. We have no objection to the filing of it, we want certain portions of it stricken.

The Court: The Amended Answer to the Second Complaint will be filed. What is your motion?

Mr. Schwab: On Page 2 of the Further Affirmative Answer and Defense, paragraph II, Line 18, move to strike the words, "the navigable waters of the United States, that is", on the ground that that states a legal conclusion and isn't a pleading or ultimate fact.

[fol. 20] The Paragraph III, we move to strike the entire paragraph on the ground that it's pleading of a legal conclusion.

Paragraph V, as pleading a conclusion, we move to strike the entire portion of Paragraph V.

The Court: Well—you got a question, John?

Mr. Buttler: Well, as far as Paragraph II, "upon the navigable waters of the United States, that is", that's taken right from the statute there, and it's thought by the defendant necessary, in order to properly plead this defense, otherwise the defendant would be open to the possible contention that they didn't plead the facts, which it would give them under the Longshoremen and Harbor Workers Act.

The Court: That was starting at Line 18, where it's "navigable waters of the United States, that is"?

Mr. Schwab: It would be—it's my contention that they can plead the factual situation as to where this portion of

property is, that we are talking about, and then it would be up to the Court to decide whether that is navigable waters of the United States, but to plead it in here, is to just plead a legal conclusion.

The Court: With the understanding that you agree that the defendant has raised the question of whether or not it happened on navigable water, I will allow the motion to strike that part of Paragraph II, "navigable waters of the United States, that is", so that the Paragraph II will read, "That said barge was upon, and plaintiff's injuries occurred upon, a certain portion of the Willamette River [fol. 21] in the State of Oregon lying between what is known as Ross Island and Hardtack Island." Now, what is the next motion?

Mr. Schwab: All the rest of the Answer, as far as that goes, Paragraphs III, IV and V. Now that again is pleading a conclusion. That is a matter that the Court will determine after hearing the evidence, and it's also pleading evidence, as far as that goes. It is something that is not required for him to plead. The question has been raised, we have agreed that they have raised the question that the Longshoreman and Harbor Worker's Act applies here, and this is all extraneous, and he is pleading a conclusion.

(Further discussion off the record.)

[fol. 22] February 8, 1956
2:00 P. M.

(Further proceedings were had in chambers as follows:)

Mr. Schwab: On that Paragraph III of the Further Answer and Affirmative Defense, all III, IV and V are subject to be stricken, that III is particularly the worst, and that it's not necessary, among other reasons that I stated this morning, it's also redundant with V.

Mr. Denecke: I won't agree to the striking, but I have no argument.

The Court: The Court is going to allow plaintiff's motion to strike all of Paragraph III, and deny the motion to strike Paragraphs IV and V.

Mr. Denecke: If this is agreeable, I will submit a new Answer.

The Court: Then you gentlemen will have a Reply in, won't you?

Mr. Schwab: We ask permission to file this Reply to the Amended Answer.

Mr. Denecke: Well, in the first paragraph there—of course, we have no quarrel with that, it's the Further Separate Reply.

Mr. Schwab: I assume you have no objection to our filing, but you want to move against it?

Mr. Denecke: That's right.

The Court: The Reply of the Amended Answer will be received and filed. In view of the fact that I struck out [fol. 23] Paragraph III of the Further and Separate Answer and Defense, so the Further and Separate Answer of Defense is going to set forth, the plaintiff was employed by the defendant, was working on the barge, not being a master or member of the crew, or engaged by the master to load or unload, repair any small vessel under 18 tons, and secured compensation under the Longshoremen and Harbor Worker's Act—I will deny the motion to strike the paragraph on the Further Separate Answer. I will allow the motion to strike Paragraph I of the Reply to the Further and Separate Answer.

Mr. Denecke: Just for the record, you knew what I was getting at. I move to strike Paragraph 1 of the Further and Separate Reply to the Amended Answer on the ground that it's irrelevant and immaterial.

The Court: Motion will be allowed and exception allowed.

Mr. Schwab: I would like to move, at this time, would the Court direct Counsel, in the interrogation of the jury on voir dire and in the conduct of the taking of testimony and argument to the jury, that no mention be made of the Harbor Worker's Act? I think if he gets the Harbor Worker's Act in, I think it would be just as proper for us to mention that there is liability insurance in this case. I see no reason for it to be mentioned.

The Court: All right, that's fair enough. This is Exhibit number 1, Defendant's Exhibit number 1.

(Document referred to was marked Defendant's Exhibit 1 for Identification.)

[fol. 24] Mr. Buttler: At all times relevant herein, Ross Island Sand & Gravel Company was the owner of record title in fee simple of the area enclosed by red pencil on Defendant's Exhibit 1, whether the land is covered by water or not, all of which property was treated as a single parcel in the original patent from the United States of America to Rebecca F. Ross, et al, dated May 5, 1873, a certified copy of which patent is marked Plaintiff's Exhibit A. Said property was acquired by defendant as a single entity by deed dated July 1, 1926, a certified copy of which deed is marked Plaintiff's Exhibit B, with the exception of certain small portions of land shown on Defendant's Exhibit 1, as not covered by water and which are immaterial to the issues in this case.

Defendant does not have, and has never had, a permit from any governmental authority, either Federal or State, to conduct its dredging operations between Ross Island and Hardtack Island, and does not pay the State of Oregon any royalties for sand and/or gravel removed therefrom.

Defendant has conducted dredging operations between the two islands, including the areas between high and low water marks for many years.

A large portion of the area between the two islands was originally dry land at least at low water and has been dug away by the defendant in its dredging operations.

Mr. Denecke: So stipulated.

(Jury empaneled and sworn; opening statements were made.)

[fol. 25] February 9, 1956
9:40 A. M.

(The following proceedings were had in open court in the presence of the jury.)

The Court: Call your witness.

Mr. Schwab: Call Mr. Hahn, your Honor.

HARRY A. HAHN was thereupon produced as a witness in his own behalf and, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schwab:

Q. Now, your name is Harry A. Hahn, is it?
A. That's right.
Q. And you are the plaintiff in this case of Hahn versus Ross Island Sand & Gravel Company?
A. Yes.
Q. Where do you live?
A. 914 Southeast 21st.
Q. In Portland?
A. In Portland.
Q. How long have you lived in Portland?
A. Well, I have lived here since about '41.
Q. Do you have a family?
A. Well, just the wife and I now, their (sic) all married.
Q. I see. You did have some, but they are all gone now?
A. Yes, that's right.
Q. On March 23, 1955, Mr. Hahn, were you working for [fol. 26] the defendant, Ross Island Sand and Gravel Company?
A. Yes.
Q. About when did you start?
A. Do you mean when I started to work that day?
Q. About what date did you start?
A. About the 15th, I imagine.
Q. Of March?
A. March.
Q. Of '55?
A. Yes.
Q. Now, generally speaking, Mr. Hahn, what type of work have you been doing for the last number of years?
A. Construction work.
Q. And roughly what kind of work do you do in connection with the construction work?
A. Oh, grease shovels, and help repair them and stuff like that.

Q. Is there any title for the general job that you do; do they call you anything in particular?

A. Oiler.

Q. They call you an "Oiler"?

A. Yes.

Q. Now, in connection with the job as oiler, in connection with machinery and so on, would you describe in some detail what your duties are?

A. Well, you usually grease the shovel, and if any break-downs, you help repair them, and things like that—change cable and things like that, you change cables.

[fol. 27] Q. Now, when you talk about a shovel, what do you mean by that?

A. Well, it's one of these shovels that dig up dirt and stuff like that, move dirt and gravel and stuff.

Q. Well, is a machine like that called a dredge or crane?

A. Well, some of them are called dredges and some are called shovels. There are different types.

Q. Now, in connection generally with working around the shovels, if there was any break-downs, you would help repair it; if there were any cable breaks, you helped repair that?

A. Yes.

Q. Let me ask you this; generally as you performed your duties as an oiler, would you have any particular lifting work to do, from time to time?

A. Oh, yes. You had your fuel to put in these shovels, like gas and oil, and you had to change your oils and gas, things like that, you had these heavy cans to lift.

Q. How about on the repairing end of it, if you had a break-down, say, on the cable?

A. Well, if you had a break-down, it all depended on what broke, in what part of the drum. If you had a shaft broke, you had to pull the shaft, and that was all.

Q. How about the cable—by shaft, is that something else?

A. Well, the shaft that runs the drum that the cables are on.

Q. Well, suppose you had a break in the cable?

[fol. 28] A. Well, you'd have to take the old one off and put a new one on.

Q. Now, these cables, are they light or heavy?

A. They are heavy.

Q. And you speak of cable, are you referring to the shovel cable that runs up to the top——

A. Of the boom, down to the ground and onto the bucket and back to the drum.

Q. Now, these break-downs and repair jobs that you are talking about, did they happen with some regularity or frequency, or would they just happen very occasionally?

A. Oh, they just happened very occasionally, but it all depended on what type of shovel it was. If it was an old one, it happened quite often.

Q. Well, what would you say on the average; would you have repair jobs to do once a week or twice a week?

A. About once a week you went over and repaired some things, you know, on a Saturday or something, when we wasn't working.

Q. Now, in connection with your job with this machine, would you be able to hold a job as an oiler if you were not able to perform this repair work, let us say?

A. No.

Q. Would you be able to perform the job if you were not able to heave or lift these gas cans or oil cans or tanks?

A. No, you wouldn't.

Q. What could or would happen if you were not able to do [fol. 29] that kind of job?

A. Well, you just wouldn't stay there; you wouldn't last.

Q. You would not be able to keep the job; is that right?

A. That's right.

Q. How long have you worked, Mr. Hahn, as an oiler?

A. Since 1937.

Q. Has that been your continuous type of work since then?

A. Yes.

Q. Now, you had only worked out there at Ross Island——

A. For six days.

Q. Well, it was from about the 15th—about the 15th to the 23rd?

A. Yes, sir.

Q. And I guess a weekend came in there, did it not?

A. Yes, I guess—yes, it did.

Q. Now, in connection with your duties, would you work for quite a number of companies over a period of a year or would you work steadily for one company?

A. Well, some years, you work for a lot of companies, and then other years, you just work for one company, but the last three years, I have only had three employers—two employers.

Q. You mean outside of Ross Island?

A. Well, outside of Ross Island?

Q. Yes, in other words, before you worked for Ross Island at the time of this accident, you had had just two employers for the last two years?

[fol. 30] A. That's right.

Q. Well now, prior to that, had you had quite a number of different employers?

A. Yes. In this work, you just take a job where you can get it. Some of these last quite a while and some of them don't last as long.

Q. It depends on what type of work is being done?

A. That's right.

Q. Are you a member of a union?

A. Yes.

Q. Which union?

A. Engineers.

Q. What is the full name of the union?

A. Hoisting Engineers.

Q. They are over here in the Labor Temple?

A. Over here in the Labor Temple, 701.

Q. And what procedure is used in connection with you and other members of the union in obtaining jobs?

A. Well, when you are out of a job, you report to the union and they send you out on jobs.

Q. Your name goes on a list?

A. Your name goes on a list, and they call you when they have a job come up, and they give you a slip and you go out on the job.

Q. Is that the usual way for the employment of people doing the kind of work you do?

A. Yes.

Q. You are permitted to go out, let us say, and contact [fol. 31] individual employers looking for jobs?

A. Well, they don't want you to do that, but it has been done.

Q. But, as I understand it, the usual way is to work through the union?

A. Yes, through the union.

Q. Could you tell us who the business agent is, over at the union?

A. Yes, Herb Shell.

Q. Well now, you told us something about what your general duties are, or have been, your general type of work, let us get down to your job that you had for Ross Island.

A. Yes.

Q. Now, you first reported to work for them on the 15th of March, 1955?

A. Yes.

Q. And was that job obtained in the way you have described through the union?

A. Yes, the union sent me over there.

Q. And when you got there, you reported to the company and they told you what your duties were going to be?

A. Yes, that's right.

Q. Now, what time did you report for work on the 15th of May?

A. 2:00 o'clock in the afternoon.

Q. Pardon me?

A. 2:00 o'clock in the afternoon.

[fol. 32] Q. 2:00 o'clock in the afternoon. Let us see, the 15th of March—did your job take five or six days a week?

A. Five days a week.

Q. And how late did you work in the evening?

A. Well, we worked seven and a half hours for eight.

Q. Well, what time would that get you off the job then?

A. Well, that would get us off—what would that be? About eleven—about ten-thirty—eleven-thirty, wouldn't it be?

Q. Well, from 2:00, and seven and a half hours would be around 9:30.

A. Well, there would be a half hour for lunch there.

Q. Which would make it 10:00 o'clock?

A. Yes, about 10:00.

Q. 10:00 o'clock at night?

A. Yes.

Q. All right. Now, when you reported to Ross Island the first day, on the 15th of March, what duties did they assign you?

A. They—well, that's what they call a derrick over there, picking gravel out of the river and loading it on the barge. My duties was to move this barge—this barge that they was loading with this raw material, back and forth so they could spread it even. Of course, I was over there—I had a big winch to move this barge with.

(Photograph referred to was marked Plaintiff's Exhibit 4 for Identification.)

OFFER IN EVIDENCE

Mr. Schwab: Now, I am going to offer Plaintiff's Exhibit 4 in evidence, your Honor.

[fol. 33] Mr. Denecke: No objection.

The Court: It will be received. What is it, a picture?

Mr. Schwab: Yes, it's an aerial photograph.

By Mr. Schwab:

Q. Now, Mr. Hahn, I am going to show you Plaintiff's Exhibit 4, and I will ask you to take a look at that and tell generally what that shows.

A. Well, that shows the lagoon in there where they was working.

Q. Well, first, let me ask you this; you say the "lagoon in there", is that Ross Island shown on the picture there?

A. Well, this could be there where their crushing plant is setting there.

Q. I don't mean the Ross Island Sand & Gravel, I mean is that Ross Island setting there in the river there?

A. Well, I don't know whether you call it Ross Island or Hardpan or what.

Q. Hardtack?

A. Hardtack.

Q. Yes. Well——

Mr. Denecke: Excuse me, your Honor, if it might help here, the one closest to the East side is Hardtack, and this one (indicating) is Ross; is that right?

The Witness: It probably is that this is Ross Island.

By Mr. Schwab:

Q. I will show you Defendant's Exhibit 1, Mr. Hahn, which is a map showing the City of Portland. I will call your attention here to the Willamette River, with an indication of Ross Island and Hardtack Island——

[fol. 34] A. Yes.

Q. —and this is the aerial photograph, which is Exhibit 4——

A. Yes.

Q. Just for the purpose of orienting you.

A. Well, Ross Island Bridge would be over here (indicating) wouldn't it—oh, down here, the Sellwood Bridge over in there (indicating).

Q. Yes. All right. This is the area down here that we are talking about, in this general vicinity here. Now, Mr. Hahn, calling your attention to Ross Island here, and Hardtack Island here (indicating), would you state where, in relation to those two islands indicated on Exhibit 1, the work that you were doing was carried on?

A. Right in here (indicating).

Q. You pointed there (indicating), do you mean in the area between the two islands?

A. Well, that's where the floating derrick was.

Q. Well now, you stated that this barge that you were on was dredging up sand?

A. Yes.

Q. And gravel from the——

A. Yes, that's where that dredge was dredging, loading them barges.

Q. Well now, this dredge that you were working on, was it on the water or on the land?

A. It was on the water.

Q. Now, was this water that you were working on located [fol. 35] between Ross Island and Hardtack Island?

A. Yes.

Q. The map here, Exhibit 1, indicates some water in between those two islands. Now, is that where your work was carried on?

A. Yes. Well, it was carried on up—right in through here, but I don't recall of that water going in between them two islands.

Q. Well, let me ask you this: was there a lagoon that you were——

A. Yes, there was a lagoon in there.

Q. And was that surrounded except on one end by the land?

A. No, sir, the land came right around like a horseshoe.

Q. In other words, it was open on one end?

A. Yes.

Q. And was all your work carried on inside of the horseshoe?

A. Yes.

Q. All right. Now, did you ever work outside that horseshoe, possibly over on the Willamette River itself?

A. Oh, no.

Q. During all the time you were there?

A. Yes. About the only time we left that rig was to go over to the plant and do some work around the plant.

Q. By "plant", you mean the plant up on McLaughlin Boulevard, or you mean at the rock crusher?

A. At the rock crusher.

Q. Well, that rock crusher was in that same horseshoe [fol. 36] area, wasn't it?

A. Yes.

Q. All right, you can sit down again. If it's all right, your Honor, I will just pass this aerial photograph around so that the jurors can see it. Now, for the purposes of the record, we have put a little piece of paper with some stickum paper over it on Ross Island itself, and since Hardtack is smaller, rather than put the tape and the paper right on Hardtack, we have put it down here in the corner, but Ross Island is up toward the top of the Exhibit, and we are talking about Exhibit 4, and immediately toward the bottom of the picture from Ross Island is Hardtack Island. Now, so that you jurors will know just what we are talking about, this is Ross Island, right where the word, "Ross"

appears, and this is Hardtack down here, because there was not room enough up there, and then you will notice that there was a land connection at this end of the Island, which would be to the left side of the Exhibit.

Would you mark these, please?

(Photographs referred to were marked Plaintiff's Exhibits 5 to 9 for Identification.)

By Mr. Schwab:

Q. Now, Mr. Hahn, you stated that you were out there in this lagoon between Hardtack and Ross Island, out on the water in connection with your regular duties?

A. Yes.

[fol. 37] Q. Now, would you explain just how the company, your employer, would get the sand and gravel that they were after? Now, if you don't understand what I mean; were they getting the sand and gravel from under the water?

A. Yes.

Q. And what would they use to get that sand and gravel from under the water?

A. Well, they used a clam-shell bucket.

Q. And what was that attached to?

A. That was attached to the rig—the shovel, and just go down and pick up a bucket full and bring it up and dump it on the barge.

Q. In other words, the jaws would open up?

A. Yes, it just goes like this (indicating).

Q. The jaws would open up and the bucket would go down to the bed, and then they would close on a load of sand and gravel, and the bucket would be picked up and dumped on the barge; is that correct?

A. Yes, sir, that's right.

Q. Now, this rig to which this bucket was attached, what did you call that again?

A. I called it a shovel, but some of them call it a dredge.

Q. All right. I think a dredge is what would be a more common discription (sic) of it.

A. Yes.

Q. This dredge, was that on a barge too?

A. Yes, that was on a barge.

[fol. 38] Q. And how was this barge anchored out there, was it anchored, or just what was the situation?

A. Well, it was anchored with some cables, one out to the island, out where the dirt was, and they had some "dead men" buried there, and they had these cables hooked on there, and that's the way they moved it.

Q. Well, you are talking about a "dead man", what is a "dead man"? Is that a piling driven in the bottom?

A. Well, you can call it a bottom, but it's usually done—they go out there and they bury a big timber, oh—they bury it down about 12–14 feet, and they hook this cable on, and that cable is brought back where your derrick is, and it's hooked on—which they have another winch on the other side, and it's hooked on to the winch, and they have three of them like that. They have one on the tail and one up at the head end and one over to one side.

Q. All right. Now, you have a barge out there with a derrick on it—not a derrick—what do you call it?

A. Crane.

Q. With a dredge on it?

A. Dredge.

Q. All right. And this was just setting out there in the lagoon?

A. Yes.

Q. And it was tied by means of cables to some—what you called dead men; is that right?

A. That's right.

[fol. 39] Q. And these dead men were big pilings that were driven into the bottom of the lagoon there?

A. Yes.

Q. And then the cables that were used to lash the barge to the pilings were attached to a winch on the barge; is that correct?

A. That's right.

Q. And what was the purpose of having the cables attached to a winch on the barge?

A. Well, after they dig so long in one spot, they run out of gravel, they have to mover (sic) back a little bit to get some more material.

Q. And this winch then, would that be used for the purpose of moving the barge?

A. To move the barge.

Q. In other words, the cable which was attached to the dead men would be run from the drum to the winch, which would move the barge one way or the other; is that correct?

A. That's correct.

Q. Now, was this winch power driven?

A. Yes.

Q. And it had how many drums on it?

A. Three.

Q. And did these drums have rather heavy cable——

A. Yes.

Q. —on the drums?

[fol. 40] A. Yes.

Q. That was used to attach the—that is, the cable was attached to these dead men?

A. Yes, just about a two inch cable, two inches around.

Q. Is that pretty large size cable?

A. That's a pretty good size cable.

Q. Steel cable, was it?

A. Yes.

Q. Now, you say that the winch itself was power driven?

A. Yes.

Q. And who ran it?

A. Well, you mean to move——

Q. Who ran the winch?

A. To move the derrick?

Q. Yes.

A. The operator ran that.

Q. I mean the winch that was used to move the barge back and forth.

A. Well, the one we used to load the gravel on, I moved that.

Q. Oh, you moved the one that you loaded the gravel on?

A. Yes.

Q. Well, we better get to that. The barge, the one we have been talking about, is the one that has the dredge on it; is that right?

A. Yes.

Q. Now——

[fol. 41] A. Right alongside of it.

Q. Right alongside of it?

A. Yes.

Q. And was that also attached to some dead men?

A. No, that wouldn't be attached to the dead men, because they would have to haul that away, that would just be brought in with a tow-boat, and pulled up alongside of you, and you would put these lines to it from another winch from the other side, and you would put these three lines on it and pull the barge in where you want it.

Q. You mean you pull the barge in toward the dredge?

A. Yes.

Q. And was that the same as the winch that was on the barge that had the dredge on it?

A. Well, yes, they are both on the same barge as the dredge is on, they got two winches on there.

Q. On the barge that the dredge is on?

A. Yes.

Q. And this other winch that you are talking about had cables that were attached to the barge that the sand was being loaded on; is that correct?

A. Yes, three of them.

Q. And there are three drums on that winch too?

A. Yes, three drums on that too.

Q. Did it have the same kind of cable?

A. No, they didn't have that big a cable.

Q. How big was that cable?

[fol. 42] A. Oh, I would say ¾ inch or inch cable.

Q. And was that steel cable?

A. Yes.

Q. Was this winch power driven the same?

A. Yes.

Q. And you say you operated that winch?

A. Yes.

Q. That is the winch that was attached to the barge that the sand was dumped on?

A. Yes.

Q. How about this other winch, now, that was attached to the dead men, you say you didn't operate that?

A. No, I didn't operate that. The Operator took care of

that, and I don't think we moved over twice while I was there, in six days.

Q. By "moving", you mean the barge that the dredge was on didn't move?

A. Yes.

Q. And so one of your main duties then, was to operate the winch that was attached to the barge on which the sand was put?

A. Yes, that's right.

Q. Now, would you state what some of your other duties were in connection with your jobs?

A. Well, I'd move that and grease up and——

Q. Now, what would you grease?

A. I greased that bucket.

[fol. 43] Q. Now, you are talking about the bucket which was used to pick up the sand from the bottom of the lagoon there?

A. Yes.

Q. And that was this bucket that had jaws on it that would close over the sand and gravel and it would be pulled up?

A. Yes.

Q. Now, was that power driven?

A. Well, it's powered from the derrick.

Q. The derrick was power driven, was it?

A. Yes.

Q. And how would they go about opening and closing the jaws of that bucket?

A. Well, that's all run from the cable on the derrick.

Q. That's all run from the main power driven machine; is that right?

A. Yes, That's right.

Q. Now, from the time that you would go to work around 2:00 o'clock, until you went back—until you went home at 10:00 o'clock, was your job always on this barge?

A. Yes, unless they had some extra work that they wanted us to do over around the plant.

Q. Yes. Well now, just going back to that barge again for a minute, where this dredge was, did you have any other duties in connection with your job there that you haven't explained to us yet?

A. Well, I don't know of any, unless the duties that we [fol. 44] would go up around the plant and do clean up.

Q. I mean just on the barge itself, did you have any other duties to perform there?

A. Well, I had to put them—when they brought in a barge, I had to put them cables on that barge, and when they got it loaded, I had to take it off.

Q. How would you go about putting the cables on the barge?

A. Well, they would be on where the derrick was, and I'd jump over on the barge that they brought in, and I'd have a flag pole or whatever they call it, and I would just reach down and get one cable and pull it over and hook it on one post out to the barge, and I'd go back and get the other one and hook it on to another corner, and then I'd go back and get a third one and hook it on another corner.

Q. And that would keep it in place?

A. Yes, and then I'd go back to the winch and adjust it where I needed it.

Q. If there was any break-down in any of the machinery, that is either the winch or bucket or the dredge or anything of that sort of thing, were part of your duties helping repair that damage?

A. Well, I don't know about that job over there, because I wasn't—I don't know whether they have a mechanic do that, because we didn't have no break-downs while I was there.

Q. I see. Was this job that you had on the Ross Island a little different than your usual duties?

A. Yes.

[fol. 45] Q. As I understand it, on the jobs that you held, if there was a break-down, it was your job to help repair it.

A. Yes. All these jobs, we—the operator and I get in there and fix it.

Q. Now, let me ask you this: In connection with your regular duties, not necessarily at Ross Island, but the jobs that you usually had, would you be called upon to lift rather heavy loads at times?

A. Oh, yes.

Q. By rather heavy, how heavy would the loads that you would be called upon to lift be?

A. Well, a lot of times, you had to wrestle, say, a 55 gallon drum around with fuel for your rig.

Q. Do you have any idea what that weighs?

A. No, I couldn't tell you.

Q. Could you give—do you have any idea how much weight you would be called upon to lift from time to time, would it be in the nature of a hundred pounds; one hundred and fifty pounds; two hundred pounds?

A. Well, that all depends on what your (sic) doing, sometimes you get ahold of something you can't lift, and then you holler for help, and a lot of the time, you get ahold of something and you say you can lift it, and then you get it down and get your knees under it and raise it up yourself.

Q. I see. Well, I was just wondering if you could just give the jury an idea about how heavy some of these loads you were called upon to lift were.

[fol. 46] A. Well, some of them weigh a hundred and fifty pounds—hundred and sixty pounds, a lot of them, and some of them, you take when you are overhauling machinery, some of them would take two–three men to handle them.

Q. And would you all be lifting to the full extent of your ability to lift?

A. Yes, all you could lift.

Q. And did that happen rather frequently, or just occasionally?

A. Just occasionally.

Q. How often would you say that would happen, that you would be called upon to lift heavy loads?

A. Well, you usually get that in the winter time, when you overhaul your equipment.

Q. How about during the summer time?

A. Oh, a lot of times, when you break down, you'd have to pull out a drum or something like that, it would break, and that would take a lot of lifting.

Q. All right. Now, to get back to Ross Island again, on the date that this accident happened, March 23, 1955, did you go out at 2:00 o'clock to your dredge there and start performing your regular duties?

A. Yes.

Q. And were you told at any time during the day to do anything different?

A. Well, I think we worked over there a couple hours, until about 4:00 o'clock, somewhere around that, and the [fol. 47] operator told me that we had to go over on the island and around the plant to do wome (sic) work over there, and then we got in a little boat and went over there.

Q. Now, when you—are you talking about around the rock crusher?

A. Around the rock crusher.

Q. Well, were you told what you were supposed to do when you got over to the area of the rock crusher?

A. Yes.

Q. And was this some foreman for the company?

A. Yes, there was a foreman over there that told you what to do.

Q. And some foreman told you to go over there in the first place?

A. Well, he must have sent word over with the fellow that brought the barge over.

Q. I see.

A. I didn't get it, I wasn't—I was back by the big winch when he brought the barge over. I guess the fellow that runs the tow-boat gave the operator the order.

Q. Well, at any rate, you were told to go over around the rock crusher?

A. Yes.

Q. And then what were you told to do?

A. Well, they had a bunch of stuff to move and haul over there, and kind of clean around, away from some of the gravel bins there, and we done that, and then we—they told [fol. 48] me that they was going to load this gravel bin on this barge, so I went down to help them load this gravel bin onto this barge.

Q. Now, by a "gravel bin", is a gravel bin ever called a hopper?

A. Well, it's a hopper, most of them call it a gravel bin.

Q. Well, describe what a gravel bin is here.

A. Well, it's just—it just comes like that (indicating), and then square up where they put this gravel, and it's

built high enough so trucks can get under it and load out of it from under there—get their loads out of this hopper.

Q. And you were told that you were going to load one of these gravel bins from one barge to another; is that it?

A. Yes.

Q. And you were directed to go over there and help get the thing loaded and unloaded?

A. Yes.

Q. All right. Now, just tell the jury what the operation was for getting this gravel bin or hopper from one barge to the other; what did they do?

A. Well, when I got down there, they was hooked on to it, and was swinging it over to the other barge with this derrick. Well, when I got down there, they was just about ready to set it down on this barge.

Q. Now, this derrick you are talking about—was the derrick you are talking about on dry land?

A. Yes. It's what they call a "stiff-leg", it's setting on [fol. 49] concrete.

Q. Now, this was right in the area of the gravel crusher, was it?

A. Yes.

Q. All right, go ahead.

A. So, when I got down there, they had this gravel bin coming around, so we—two or three fellows came over from the tow-boats to help me set it down.

Q. Now, before we go any further here, so the jury will know just where we are talking about, I will ask you if the gravel crusher is in this area right in here some where (indicating)?

A. Yes, right in here (Indicating).

Mr. Schwab: Why don't you have it marked, Arno, since it's yours?

Q. In other words, the gravel crusher is in the same area between the two islands; is that right?

A. Yes, this is where your crusher is (indicating).

Mr. Schwab: He has pointed out an area right in here (indicating).

The Clerk: Defendant's Exhibit 10 for Identification.

(Document referred to was marked Defendant's Exhibit 10 for Identification.)

By Mr. Schwab:

Q. I will show you an exhibit which has been marked Defendant's Exhibit 10 for Identification, and I will ask you if that is more of a close-up of the gravel crushing area?
[fol. 50] A. Yes, sir, that's better.

Q. Well, that's about all that is shown on that is the gravel crusher?

A. Yes, that's all that is shown on this, practically.

The Court: Do you want to introduce it in evidence?

Mr. Schwab: Well, it is the defendant's exhibit, I don't want to preempt him.

OFFER IN EVIDENCE

Mr. Denecke: I will introduce it.

Mr. Schwab: No objection.

The Court: Receive Defendant's Exhibit 10.

By Mr. Schwab:

Q. Now, you say—I think you ended off when they were just about to set this hopper down on the second barge, the barge that you were putting it on?

A. Yes.

Q. And, where were you at this time; were you on the land or were you out on the barge?

A. I was on the barge then, already.

Q. You were on the barge that they were going to load the hopper on?

A. Yes.

Q. Now, how was the—you mentioned there was a derrick that was being used to load the hopper from one barge to the other?

A. Yes.

Q. How was that derrick attached to the hopper?

A. Well, I never got to the top, but I imagine it was a cable—you know, they have rings on top where we usually [fol. 51] stick a cable, and then it was fastened around the bucket, and hooked on, and this guy just picks up the bucket, and that way he raises the hopper.

Q. Now, this derrick that your (sic) talking about, that

they had lifting the hopper from one barge to the other, that is power driven, I assume too, isn't it?

A. Yes.

Q. Now, did you help to get the hopper set down on the barge?

A. Yes.

Q. In the manner they wanted it set down?

A. Yes, you had to turn it and set it down right.

Q. While it was still off the barge?

A. Yes, while it was still up in the air. It was down maybe two feet from the sand they was going to set it on—it was about two feet up in the air yet.

Q. Well, the hopper then, was eventually set down on the barge?

A. Yes.

Q. And then you had to get the cable that was being used that was attached to the derrick loosened up so that you could get it?

A. Yes, that was fastened to the derrick and the hopper.

Q. So was that your job to do that then?

A. Yes.

Q. What did you do?

A. Well, I started up, and I went up one ladder and [fol. 52] stepped around the corner and started up the other ladder, and I got my hand on about the last rung when the ladder pulled away.

Q. Well, by the last rung, what do you mean by that?

A. The top rung, right at the top.

Q. Now, before we go any further on that, I am going to show you Plaintiff's Exhibit 5 for Identification, I will ask you what that is?

A. That's the hopper.

Q. Is that the hopper we have been talking about?

A. That's the hopper we have been talking about.

Mr. Denecke: Excuse me, which one is that?

Mr. Schwab: 5.

By Mr. Schwab:

Q. Now, just so there will be a little more explanation here, what do they use that hopper for?

A. To load material out of. They dump material up in here (indicating), and their trucks pull in here and haul it out.

Q. This is high enough for trucks to drive underneath it?

A. Yes.

Q. All right. Now, I will show you Plaintiff's Exhibit 6, and ask you what that is?

A. That's the hopper.

Q. That's another view of the hopper?

A. Yes.

Q. And, I will show you Plaintiff's Exhibit 7, and I will ask you what that is?

[fol. 53] A. Well, that's the top of the hopper, see, that's where they dump everything in from the top.

Q. Now, I will show you Plaintiff's Exhibit 8, and I will ask you what that is?

A. Well, that's the legs of the hopper right there, and there is your lever that they use to open the gates to load the gravel from.

Mr. Denecke: Excuse me, what is that?

The Witness: The lever on the side where they open the gate.

By Mr. Schwab:

Q. Now, you notice something leaning against the side of the hopper there—right in here (indicating), and I will ask you what that is?

A. Well, that's just the braces in there. This is the old ladder setting up here (indicating), alongside there.

Q. That's the ladder?

A. Yes.

Q. Is that the ladder that you climbed up on that night?

A. Yes, that's the ladder that pulled loose.

Q. Incidently, (sic) were you present when this picture was taken?

A. Yes.

Q. And, at that time, was this ladder just leaning up against the hopper?

A. No, it was next to a shed, we set it there.

Q. But, at the time the picture was taken, the ladder was leaning up against the hopper; is that right?
[fol. 54] A. Yes.

Q. In other words, it wasn't attached to the hopper?

A. No.

Q. All right. Now, in connection with this Plaintiff's Exhibit 8, I will ask you if that is a true representation of the way the top of the ladder looked at the time of the accident?

A. Yes.

Q. With the exception, of course, that it is now completely off of the hopper?

A. That's right.

Q. I will show you Plaintiff's Exhibit 9 for Identification, and ask you what that is?

A. That's the ladder setting down—a lower shot—well, that's the bottom of the ladder.

Q. That's the bottom of the ladder?

A. Yes.

Q. And, I will ask you also here, if this is a true representation as to how that portion of the ladder looked on the night of the accident?

A. Yes.

Q. And, in connection with the three views of the hopper—that is, 5, 6 and 7, I will ask you if those are a true representation of the way the hopper appeared on the night of March 23, 1955?

A. Yes, that's right.

Q. Now, this ladder that we are talking about, Plaintiff's Exhibit 8, you say, is the top of the ladder?
[fol. 55] A. Yes, this is the top here (indicating).

Q. And 9, is the bottom of the ladder?

A. That's the bottom of the ladder.

Q. Now, on Plaintiff's Exhibit 7, there appears to be a ladder that starts with a small line at the bottom, and they get bigger as they go up—about half way up?

A. Yes.

Q. I will ask you if that is the ladder that you climbed up that night?

A. Yes, that's supposed to be the ladder, and it came up

here (indicating), and then you cut over there and went up the other side up here (indicating).

Q. In other words, you went up this half ladder and then you went around the corner?

A. Yes.

Q. And then the other ladder that came down, as shown by 8 and 9 were attached on the other side?

A. Yes.

Mr. Denecke: Was that 5, that you were referring to at the last?

Mr. Schwab: The one showing the half of the ladder—the bottom half?

Mr. Denecke: Yes.

Mr. Schwab: That's 6.

By Mr. Schwab:

Q. Now, looking at the picture showing the top of the ladder again, there is two boards there, one appears to be longer than the other——

[fol. 56] A. Yes.

Q. Now, taking the longer of the two boards, where was that in relation to the top of the hopper?

A. That was—see, this here (indicating) was on the corner, and then this one come over from the corner.

Q. Well, let me ask you the question again: This ladder that was on the second half of the top half of the hopper——

A. Yes.

Q. —did the top of the ladder come somewhere near the top of the hopper?

A. Well, this one here did, but this here (indicating) didn't, because it come up—it was nailed to kind of a upright like this, see—this part was nailed along here, but this part here was nailed to the top.

Q. Well, is it a correct statement then, that the top of the longer of the two boards on this ladder, as shown by Exhibit 8, was nailed to the top of the hopper?

A. Yes.

Q. Now, I will show you Plaintiff's Exhibit 5 here, which is a view of the entire hopper, and I will ask you if that

is the side of the hopper to which the top section of the ladder was nailed?

A. Yes. This side here, and the lower half was on the other side.

Q. Now, the Plaintiff's Exhibit 5 shows some nail holes—what appears to be nail holes at the very top of the hopper, [fol. 57] and I will ask you if that is the approximate area where the ladder was nailed?

A. Yes. Well, see—the short end was nailed in here (indicating), and then that long one here, was nailed up here (indicating).

Q. Well, when you say "up here", I wonder if you could point that out——

Mr. Denecke: Your Honor, I haven't seen these pictures before, and I haven't known exactly what they were, but I think they should be offered, there is no objection, and I could study them I think he has gone beyond identifying them.

The Court: That's 5, 6, 7, 8, 9——

Mr. Schwab: 10 has been admitted.

The Court: Yes. 5, 6, 7, 8 and 9. How much longer is your direct examination going to take?

Mr. Schwab: Oh, I imagine it will take 30–40 minutes yet.

The Court: At this time, Ladies and Gentlemen of the jury, we will take the usual morning recess.

(Whereupon a short recess was taken.)

[fol. 58] The Court: All right, Mr. Schwab, proceed.

Mr. Denecke: I have no objection to 5, 6, 7, 8 and 9.

The Court: 5, 6, 7, 8 and 9?

Mr. Denecke: Yes, your Honor.

The Court: Very well, they will be received.

(Photographs were received in evidence as Plaintiff's Exhibits 5, 6, 7, 8, and 9.)

By Mr. Schwab:

Q. Now Mr. Hahn, so that there is no—we have got five pictures here—so there is no question as to what these

pictures show, I will ask you concerning 5 again. As I understand it, that shows the hopper?

A. Yes.

Q. And it also shows the side of the hopper to which the second or top section of the ladder was nailed?

A. That's right.

Q. And, as I understand it, the left side of the ladder was nailed to this large beam running clear across the top of the hopper?

A. Yes.

Q. And the right side of the ladder was nailed to the board that appears above that beam that runs clear across the top?

A. Yes.

Q. Now, referring to exhibit 7, as I understand it, that shows—is a view of the top of the hopper?

A. Yes.

Q. Now, which are—strike that. Does the side of the [fol. 59] hopper to which the top section of the ladder was nailed, show on this picture?

A. Well, this is where the ladder come up on this (indicating).

Q. You mean now, your pointing to the left side of the picture, and showing the side of the hopper which just appears on the left side of the picture; is that correct?

A. That's correct.

Q. And you are not pointing to the side of the hopper which shows as a frontal view?

A. No. This is the long side of the hopper.

Q. And the ladder, as I understand it, was nailed to the side which shows in this picture?

A. Yes.

Q. And, to make that a little clearer, is there a board there that appears to be hanging down there a little bit?

A. Yes, that's the board that pulled loose, that the top part of the ladder was nailed to.

Q. All right. Now, referring to Exhibit 6, as I understand it, this shows a side of the hopper in question, and it also shows the bottom section of the ladder?

A. Yes.

Q. Now, in connection with that, as I understand it, you

went up the bottom section of the ladder, which shows on that——

A. Yes.

Q. —picture, then when you got up to the middle of the hopper, you went around the——

[fol. 60] A. Yes, over to the right.

Q. Over to the right, and then up to where the section of the ladder was nailed?

A. Yes.

Q. And, referring to Exhibit 8, as I understand it, that shows the top portion of the ladder on which you were at the time that it broke loose?

A. Yes.

Q. And that picture shows the top rung of the ladder, together with the two boards that formed the supports for the ladder?

A. Yes, that's right.

Q. And, referring to Exhibit 9, as I understand it now, that shows the bottom of the ladder?

A. Bottom of the ladder.

Q. And the ladder we are talking about, is the ladder that was nailed to the top half of the hopper?

A. Yes.

Q. Now, while they are looking at those pictures, Mr. Hahn, I am going to show you again Exhibit 4, which was an aerial photograph of Ross Island. and I am going to ask you to mark on here with an "X", the approximate spot in the lagoon there where your regular duties were carried on, that is, when the dredging operations were going on.

A. Okeh.

Q. Just put a small "X" in the general area where the dredging operations were carried on.

[fol. 61] A. There, that's better.

Q. You have inked an "X" in the lagoon area, in the general area where the dredging operations were carried on?

A. Yes.

Q. Now, I will ask you to—with the same pen, ink a little circle in the general area where the barge was located, where the hopper was put, where you fell that night.

A. Okeh.

Q. All right. Now, you went up the bottom section of the ladder, you went around the corner and started up the second section of the ladder?

A. Yes.

Q. And you had gone up to about the top rung, as I understand it?

A. Yes, I had my hand on the top rung.

Q. And, what happened then?

A. Well, the ladder just pulled loose from the gravel bin and just come backwards, and I——

Q. And what happened to you?

A. Well, I started to fall, and so I finally hit the deck.

Q. Did you hit anything on the way down, or did you fall straight down?

A. I fell straight down.

Q. And how did you land, Mr. Hahn?

A. Well, I hit with the point of the sand coming like that (indicating) across my back, and my head on one side and my feet on the other side of this point of the sand.

[fol. 62] Q. Did you light on your back or on your side?

A. Right smack on my back.

Q. You mentioned some sand, was there some sand on the barge at the time you fell?

A. The barge was loaded with sand, and it was wet sand and hard packed, and when I hit, it kind of knocked the wind out of me, and I kind of looked and I seen the ladder coming down, and I stuck my arm up like that (indicating), and the ladder struck me across the arm.

Q. All right. Did the whole of that ladder, that second section of the ladder come down, or just a part?

A. Yes, the whole section.

Q. Now, you have testified that this happened around 8:00 o'clock at night?

A. Yes.

Q. And of course it was dark at that time?

A. Yes, it was dark.

Q. Was there any artificial lighting in that area?

A. Oh, yes, they had flood lights around, you know.

Q. Was there light from the flood lights on the barge and on the hopper itself?

A. Yes.

Q. Did you have any trouble seeing the hopper?

A. No.

Q. Now, would you state—well, strike that. Do you know how the ladder, this second section of ladder that you were on when you fell, how that was fastened to the hopper?

[fol. 63] A. Well, it was just nailed.

Q. It was nailed?

A. Yes.

Q. And, do you know how many nails it had in it?

A. I couldn't say for sure, I think there was three nails on each arm of the ladder.

Q. I mean how it was nailed to the hopper.

A. Well, it was nailed on the top on both sides and on the bottom.

Q. You say with three nails on each side?

A. Yes. I wouldn't say for sure, but I think that's what it was.

Q. Now, was there anything else whatsoever there to hold that ladder in place?

A. No.

Q. Was there any bolts?

A. No.

Q. Either through bolts, "U" bolts, or chains or anything else?

A. No, that was all that was in it, just them nails.

Q. And did you observe the condition of the hopper at the top where this second section of ladder was nailed, insofar as the condition of the wood that was used for that portion of the hopper where the ladder was nailed at the top?

A. What do you mean by that?

Q. Well, did you notice the condition of the wood?

A. Oh, yes. It was rotten.

[fol. 64] Q. It was rotten?

A. Yes.

Q. Are you speaking of the wood right in the area where the ladder was nailed?

A. Yes. Well, the whole top of it was rotten.

Q. Now, let me ask you this: Had this ladder been fastened up there—the second section of ladder been fastened with bolts or with rivets, or with a chain around the ladder

and around the hopper itself, would that in any way have impaired the efficiency of the hopper?

A. No, there is a lot of them made that way, most of them are made that way.

Q. Or if the ladder had been securely fastened to the hopper in some manner, would that have interfered with the efficiency of the use of the hopper?

A. No.

Q. Or would it have interfered with the efficiency of the hopper if the top boards or planks where the ladder was nailed had been sound wood instead of rotten wood, as you have described it?

A. No, it should make the hopper better.

Q. Had anyone, prior to your going up this ladder, warned you as to the condition of the ladder?

A. No.

Q. Or the condition of the hopper?

A. No.

Q. Now, were there other employees of the company [fol. 65] around at the time you fell, Mr. Hahn?

A. Yes.

Q. And were they all employees of Ross Island?

A. Yes.

Q. Now, you state you fell off the ladder and hit on your back in this wet sand?

A. Yes.

Q. You say the wind was knocked out of you temporarily; the ladder came down; you put your arm up to ward it away, and the ladder hit you on the arm?

A. Yes.

Q. All right. Now, state what happened after that.

A. Well, one of the fellows came up to me and asked me if I was hurt, and I said, "No, I don't think so, I think the wind is knocked out of me." And he said, "Lay there for a while, maybe you will be all right." So I laid there two, three or four minutes, and I started to get up and he helped me up, and I started to go ahead and work, and the longer I worked the worse I felt.

Q. Now, how late did you stay out there on the island that night, Mr. Hahn?

A. Until 12:00 o'clock.

Q. How did you happen to stay out that late, when your shift usually ended at 10:00?

A. Yes. Well, they had some work to do with the plant, and we were supposed to help.

Q. You are talking about the crusher plant?

[fol. 66] A. Yes, they were changing some chains, and we were supposed to help them and get the chains changed, so we stayed until 12:00 o'clock.

Q. I see. Now, after that then were you taken to the plant—to the main plant on the dock there?

A. Yes.

Q. And did you go home from there?

A. I went home from there.

Q. Now, around 12:00 o'clock, how did you feel?

A. Well, I felt pretty bad, I couldn't hardly make it up to the shore.

Q. You say you felt bad, in what area?

A. In my back, it was paining me.

Q. Would you just indicate so the jury will have an idea of your back, where you hit it and where it hurts you?

A. Right in the middle of my back.

Q. The lower portion there, or right in the middle?

A. Right in the middle.

Q. All right. Now, you went home then, did you?

A. Yes.

Q. Did you go to work the next day?

A. No, I ain't went to work since.

Q. What was your condition the next day, Mr. Hahn?

A. I was pretty sore.

Q. You were sore?

A. Yes.

Q. Your back. Anything else?

[fol. 67] A. My back and my neck.

* * * * * * *

[fol. 68] Harry A. Hahn was thereupon recalled as a witness in his own behalf, and having previously been sworn, was examined and testified further as follows:

Further direct examination.

By Mr. Schwabe:

Q. I would like to ask you a couple more questions, Mr. Hahn. You answered this morning, in answer to a question

that I asked you, how many members there were in your union over there, and you said 16000?

A. Yes, I made an error.

Q. Did you check up on that?

A. I checked up on that at noon.

Q. And what did you learn?

A. There is between 3700 and 4000.

Q. Do you know where you got the idea of 16000?

A. I don't know where I got that idea.

Q. Just one other question, Mr. Hahn. Now, you testified as to your regular duties out there on Ross Island where you were working on this dredge, and you were filling up these barges?

A. Yes.

Q. Now, when the barges were filled up with sand, where were they taken?

A. Over to the plant—over to the crusher.

Q. In the area where you marked a circle this morning on that Exhibit 4?

A. Yes.

[fol. 69] Q. In connection with that hopper that you were testifying to, that you were climbing at the time you fell, had you ever seen that hopper before?

A. No.

Q. Just one other question, Mr. Hahn, I didn't ask you how your neck felt at the present time?

A. Well, it feels pretty good right now.

Q. Does it give you much trouble at the present time?

A. No, not right now.

Q. I don't mean this minute, but does it bother you from time to time?

A. Now and then it bothers me.

Q. In what way?

A. Oh, I don't know, it just snaps and pops in there.

Q. Does it cause you any pain at all?

A. Yes.

Q. How often and how bad?

A. Oh, about—oh, I'd say once a month o something like that.

Q. Is it a severe pain or just a light pain?

A. Well, it's not too severe.

Mr. Schwab: All right, that's all. You may cross examine.

Cross examination.

By Mr. Denecke:

Q. Mr. Hahn, I hand you what has been marked Defendant's Exhibit 10, which is, as you see, a picture of part of what is shown on 4 here?

[fol. 70] A. Yes.

Q. I wonder if you would first point out—use your finger there—point out on that where you were at the time you fell from the hopper?

A. Well, there is your rig, and I'd be right on the bottom, as far as that boom comes down, and that would be right in there (indicating), where that string is coming down.

Q. May I see it just a minute here, and we will have this marked. There is a barge there in this picture?

A. Yes.

Q. Is that about—where?

A. That's about where it would be, so this boom here (indicating)—the tip of that boom could reach the end of that barge.

Q. Would you mark on here with the pen, Mr. Hahn, where it was that you were, as best you can remember?

A. Well, put an "O" there, or——

Q. An "O" or an "X", either one, where you are going to put——

A. An "O", right about in there (indicating). See, that cable comes right straight down to the tip of your boom.

Q. And that, Mr. Hahn, that "O" is right on a barge that is in the picture there?

A. Yes.

Q. And, do I understand that the barge that you were on when you fell from the hopper was about where that barge [fol. 71] in the picture is?

A. About where it is, as close as you can get to it.

Q. Now, do you know, Mr. Hahn, when this hopper came into the lagoon there? By lagoon, I mean the water between the two islands?

A. No, I don't know.

Q. When that came in—you don't know where it came from?

A. I don't know where it come from.

Q. Do you know whether that barge with the hopper on it was there when you went out to the dredge on the afternoon when you started work on Wednesday, March 23rd?

A. I don't know whether it was there then or not. I don't think it was. I couldn't say for sure.

Q. Now, as I understand it, Mr. Hahn, you went back and forth to the dredge on a small boat—in a small boat?

A. Yes.

Q. And, where did you go to the dredge from; the mainland there?

A. From the mainland.

Q. And the mainland that I am talking about, and I think you were, where the Ross Island has their place there, right off McLaughlin Boulevard and down hill to the bank?

A. Yes.

Q. Let me get one other thing straight, Mr. Hahn. In Plaintiff's Exhibit 8, which is the ladder here——

A. Yes.

Q. —as I understand it, this was taken sometime after [fol. 72] your accident?

A. Yes.

Q. And this ladder that is in the picture here, was leaning against a shed of some type, not around the hopper?

A. Well, about ten feet from the hopper.

Q. It wasn't leaning against the hopper?

A. No, sir, it wasn't.

Q. Then, for the purpose of this picture, you or somebody took the ladder and put it over against the hopper?

A. That's right.

Q. What kind of work, Mr. Hahn, were you thinking about doing down in Salem; you said it was a temporary job for a couple months?

A. Checking trucks.

Q. Checking trucks?

A. Yes, just put down the time you came in and went out.

Q. But you would have to drive from your home here in Portland down to Salem every day?

A. Yes, I'd stay in the car all day to do that.

Q. Mr. Hahn, before you went to Ross Island, had you worked for Rogers Construction?

A. Rogers Construction, yes.

Q. And, when did you leave Rogers; about when?

A. Gosh, I couldn't tell you, I have no idea.

Q. Let's see. You started at Ross Island in March of '55. Had you worked with Rogers in '55 at all?

A. Yes—no, I didn't work in '55—yes, I did too. I worked [fol. 73] in '55 for Rogers.

Q. In the winter there, of '55—let me put it this way, winter of '54 and '55?

A. Yes.

Q. You don't recall when you left them?

A. No, I don't.

Q. And, then, did you work for Mr. Perkins, one of the prospective members of the jury?

A. Yes.

Q. Did you work for him before Rogers?

A. No, I worked right after I left Rogers, I worked for him.

Q. And then——

A. And then Ross Island.

Q. Mr. Hahn, when you were working there on the dredge, you worked there—let's see—five days?

A. Six days.

Q. Six days. There were—am I correct, that during that time you saw tugs or tow-boats bringing barges into—I will have to point the area out—can you see this? Into the area—maybe I better use a picture here instead—into this—I have called it a lagoon, and I mean this whole body of water between what we have marked as Ross Island and Hardtack Island on Exhibit 4?

A. Yes.

Q. Did you see tow-boats bring barges in and take barges out from this general area?

[fol. 74] A. Not from this area out this way (indicating), but from here over here you see (indicating).

Q. Oh, I see. From where you were working, you couldn't see what happened in here (indicating)?

A. No.

Q. As I understand it, what you saw them do, was a tow

boat, or a tug-boat would take a barge that was filled by the dredge you were working on, and tow or pull it over to what you describe as being the crushing plant, where you were hurt?

A. Yes.

Q. And they would also bring emties (sic) from there over to where you were working on the dredge?

A. That's right.

Q. On that picture, and I guess I better—Exhibit 4, and I don't know whether you can see it from there, Mr. Hahn, there is some log rafts parked there?

A. Right in here, yes. (indicating)

Q. You have observed log rafts parked or moored in that lagoon in there?

A. Yes.

Q. Did you ever see these brought in or taken out?

A. No, I didn't.

Q. This dredge that you were working on was—I refer to it as a barge, it is a barge, isn't it, with a crane on it?

A. Yes.

Mr. Denecke: That's all, your Honor.

The Court: Any redirect examination?

[fol. 75] Mr. Schwab: No, your Honor.

The Court: That's all. Ladies and Gentlemen of the jury. You have three very able lawyers here, and we have had a little difficulty, so we may have to recess until tomorrow. You want to make your stipulation out of the presence of the jury, and read it to the jury tomorrow?

Mr. Schwab: I think that's right.

The Court: They wish to shorten things in this case, by stipulating to a lot of facts, and they are going to get it in the record and read it to you tomorrow.

At this time, we will take a recess until 9:30 A.M. tomorrow morning, and please remember the admonition of the Court, and don't discuss this case amongst yourselves or any other person.

(Whereupon the jury was excused and the following proceedings were had out of the presence of the jury:)

Mr. Buttler: Harbor lines have been established by the United States War Department pursuant to 33 U. S. C. A.

Section 404 in accordance with the chart marked Plaintiff's Exhibit C, which chart accurately indicates the location of the harbor lines around Defendant's property involved herein by a broken line over which has been drawn a red pencil line. Said chart may be admitted in evidence without further identification for the purpose only of showing the location of the harbor lines at the time of the accident herein.

The chart marked Plaintiff's Exhibit D is what it pur- [fol. 76] ports to be, and accurately represents the conditions shown as they existed in 1895. Said chart may be admitted into evidence without further identification.

Defendant has secured the payment of compensation under the Longshoreman's and Harborworker's Compensation Act, (33 U. S. C. A. Section 890), in the manner provided for by the said Act, but this part of the stipulation shall not be a (sic) available to the Defendant on motion for non-suit, if such a motion is made. Defendant has rejected the Oregon Workmen's Compensation Act and has provided private insurance which would cover defendant's liability under the Oregon Employer's Liability Act or its liability under the rejected Oregon Workmen's Compensation Act.

Mr. Denecke: The Defendant does not admit that the rejection of the Oregon Workmen's Compensation Act or the procuring of other insurance is relevant or material and contends to the contrary and only makes this stipulation to save plaintiff calling a witness to the effect and making an offer of proof to this effect, in as much as the Court has already stricken plaintiff's Further and Affirmative Reply.

Mr. Buttler: Plaintiff's life expectancy at the time of the accident was 16.43 years.

Plaintiff's medical expenses incurred in the amount of $342 are reasonable.

(Whereupon a recess was taken until 9:30 A.M. the following morning, February 10, 1956.)

[fol. 77] (Friday, February 10, 1956, 9:30 o'clock A.M., pursuant to recess, proceedings were resumed in open court in the presence of the jury as follows:)

The Court: Call your next witness.

Mr. Schwab: Plaintiff calls Mr. Kudzia.

EDWARD KUDZIA was thereupon produced as a witness in behalf of plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Butler:

Q. Would you state your name, please?
A. Edward Kudzia.
Q. You are employed by the defendant Ross Island Sand & Gravel Company?
A. That is right, sir.
Q. How long have you been employed by them?
A. This is not positive; I think since the 6th of August, 1952.
Q. Then you were employed by them on March 23rd, 1954, at the time this accident occurred?
A. Yes, sir.

Mr. Denecke: '55.
Mr. Butler: 1955, correct; excuse me.

Q. Now, were you in any way involved in the loading operation of the hopper from one barge to another; that is, the hopper that was involved in this accident?
[fol. 78] A. Yes, I was.
Q. Now, how were you involved?
A. I unhooked the hopper; hooked—unhooked the crane from the hopper, rather.
Q. Well, now, let me go back then. How did you happen to be around at the time the hopper was being loaded?
A. We work on the boat and we tow the material and also the hopper from one job to the other.
Q. Now, what type of work do you do for the defendant?
A. Well, I am a boatman.
Q. You are a boatman?
A. Yes.
Q. On what kind of a boat?
A. A tugboat.
Q. On a tugboat. And the tugboat on which you were a boatman was at the scene of the accident; is that correct?
A. That is right, sir.

Q. What was the towboat's function in the operation, if any?

A. Tow material from one job to the other.

Q. Well, I mean in this particular loading operation.

A. None whatsoever; we were standing by.

Q. You were just standing by?

A. That is right.

Q. How did you happen to get onto the barge on which the hopper was being loaded?

A. The towboat was tied alongside the barge.

Q. That is the barge to which the hopper was being moved?

[fol. 79] A. Being loaded, that is right, sir.

Q. Yes. Now, how was the hopper being moved aboard the barge?

A. By a stationary whirley from the beach.

Q. When you say a whirley, would you describe what that is?

A. Well, that is a crane for either picking up heavy objects or unloading gravel.

Q. And the hopper was hooked to the crane and lifted and moved over to the barge to which it was——

A. That is right, sir.

Q. —to be loaded?

A. That is right.

Q. Now, did you see the plaintiff, Harry Hahn, on the barge?

A. Yes, I did.

Q. Did you see him attempt to climb up on the hopper?

A. Yes.

Q. Did you see him fall?

A. Yes.

Q. Can you state what happened when he fell?

A. From the way I recall he climbed up the ladder and I—at the time that he fell I wasn't looking up, but he did fall almost on top of me; something brushed my shoulder and Mr. Hahn was laying alongside the hopper with the ladder.

Q. With the ladder?

A. Yes.

Q. And was the ladder pulled loose from the hopper?

A. That is right.

[fol. 80] Q. At that time did you observe how the ladder had been attached to the hopper?

A. The ladder was attached with 60 penny spikes.

Q. Were there any bolts of any kind used?

A. That I couldn't say; I can't recall.

Q. You didn't see it?

A. I didn't see it.

Q. All you saw were nails through the ladder?

A. That is right.

Q. After Mr. Hahn fell what if anything did you do?

A. Well, I kneeled down alongside him and asked if he was hurt and told him to lay still if he was hurt so that he wouldn't injure himself further, and he laid there for some time and then he told me he was feeling better.

Q. Then what did you do if anything? Did you do anything further on the barge?

A. Well, then I can't quite—that has been quite some time, I can't quite recall. I think Mr. Hahn got up and then I took his place as he left.

Q. When you say you took his place, what do you mean?

A. So the work wouldn't stop; I went up to cut loose from the hopper.

Q. You unhooked the crane from the hopper?

A. Yes, sir.

Q. Now, in getting up on the hopper did you observe the condition of it?

[fol. 81] A. Well, I crawled—I crawled up the side of it.

Q. Yes. And did you observe in what condition the hopper was at that time?

A. Well, it was an old hopper, one which had been used regularly on these jobs, and I am not authority on—on hoppers, I am a boatman; it seemed kind of more or less as an old hopper is all I can say.

Q. I am handing you Plaintiff's Exhibit 5 and will you state whether that is a picture of the hopper which was involved?

A. Yes.

Q. And that picture accurately represents the condition in which the hopper was at the time of the accident?

A. Well, yes, I guess it would.

The Court: Keep your voice up, please.

A. I guess it would.

Q. As far as you know it is?

A. Yes.

Q. Now, the view shown in Plaintiff's Exhibit 5 would show the fact of the hopper to which the upper section of the ladder was attached; is that right?

A. I can only state as I think I remember; this may not —the ladder here would come up the side, you would get on a platform and then work your way—the ladder was approximately up the face of the——

Q. Up the center of that face of the hopper; is that correct?

A. As close as I remember, yes.

[fol. 82] Mr. Denecke: That is No. 5?

Mr. Butler: No. 5. Your witness.

Cross examination.

By Mr. Denecke:

Q. Mr. Kudzia, your job, as I understand it, is on one of the tugboats for Ross Island; that is the ROSS ISLE, is it not?

A. That is right, sir.

Q. And how large is that tugboat?

A. Oh, a little over 50 feet.

Q. And what generally does the tug ROSS ISLE do?

A. We tow sand and gravel from one job to the other.

Q. Mr. Kudzia, I hand you Defendant's Exhibit 10, which we have all stated was an aerial photograph of what has been referred to as the crushing plant and a portion of what we have sometimes called the lagoon or the water between Ross Island and Hardtack Island. Now, where do you come—or let me ask you this: At the night that Mr. Hahn was injured was your tug tied up approximately where Mr. Hahn has previously inked in a circle; and I am only asking approximately?

A. That——

Q. Can you see that circle there? It is hard to get the ink to take on there. See it right there (indicating)? And I am only asking approximately.

A. That was along—it is the approximate place, but we was alongside the barge, not on the end of the barge.

A. There is a barge shown in this picture?

[fol. 83] A. Yes.

Q. And you were alongside of it?

A. We were alongside, not on the end of it. We were not hooked up; we were just laying alongside.

Q. And does the tug ROSS ISLE work in and out of this area of water between Ross Island and Hardtack Island? By "in and out", come in here and go out of here (indicating)?

A. Yes, it does.

Q. And how do you go out of this lagoon or body of water here?

A. There is two entrances; one along Hard' .ck Island and one along the plant.

Q. Now, do I understand, so I can be sure, Mr. Kudzia, there is a tower of some kind right in the——

A. Center.

Q. —in the center of the entrance into this body of water between Hardtack and Ross?

A. Yes, sir.

Q. And I do understand correctly that you go in and out of there with your tug on one side of that tower or the other, sticking close to Hardtack or sticking close to Ross?

A. That is right, sir.

Q. And I am not—we are not interested in exactly what your course of navigation is.

Now, where do you go——

Mr. Butler: Your Honor, I think this is a little beyond the scope of the direct examination. If Mr. Denecke wants to make him his own witness that is perfectly all right.

[fol. 84] Mr. Denecke: I admit that is correct, your Honor, but the only reason I am doing it is I got these men here and it is known that it is necessary for them to—or at least we believe it is necessary for them to get back to the job in a hurry.

The Court: Do you want to make him your own witness?

Mr. Denecke: I would be glad to make him my own witness, your Honor.

The Court: All right.

By Mr. Denecke:

Q. Mr. Kudzia, where do you go with the tug ROSS ISLE?

Mr. Butler: Your Honor, I would like to state for the record that up to the present point all the testimony that has been given would be for the purpose of Mr. Denecke's own witness.

The Court: That is correct, from now on, yes.

Mr. Butler: From now on, and for that testimony which has been given, all of which had nothing to do with the direct examination.

Mr. Denecke: Your Honor, I will agree to that also.

The Court: Very well.

By Mr. Denecke:

Q. Mr. Kudzia, do you go down as far as the mouth of the Columbia with the tug ROSS ISLE?

A. Yes, we do.

Q. And that is on the Columbia?

A. I would take that back. We come within, oh, approximately three miles of the mouth.

[fol. 85] Q. You don't go to the bar?

A. No.

Q. You come about three miles inside the Columbia River bar, is that correct?

A. That is right, sir.

Q. Am I right you are referring now to Ilwaco?

A. Yes, that is right.

Q. On the Washington side of the river there?

A. That is right.

Q. And how far up the Columbia do you go?

A. Since I have worked for Ross Island we have went as far as above Cascade Locks—rather, the Bridge of the Gods.

Q. Is that the one that is called Bonneville Locks now?

A. No; that is above the Bonneville Locks.

Q. That is above the Bonneville Locks?

A. Above. We have been as far as above the Bridge of the Gods.

Q. I see. Now, with this particular hopper, that was the one that Mr. Hahn was climbing, Mr. Kudzia, where did that come from? Let me ask you this:

I think the testimony is, Mr. Kudzia, that the hopper came into the water there between Hardtack and Ross on the 23rd, the day that Mr. Hahn was injured. Do you know where it came from?

A. Well, it came from another job.

Q. And do you know where that other job was?

A. Yes; Sun Dial beach.

[fol. 86] Q. And did you bring the hopper from Sun Dial beach; that is, did you tow a barge on which the hopper was?

A. Yes, we did.

Q. And Sun Dial beach, is that on the Sandy?

A. That is on the Sandy, or approximately across the river from Camas, a little downstream on the opposite side.

Q. And you towed a barge with this hopper on it from Sun Dial beach down the Columbia and up the Willamette and into the lagoon or the water between Hardtack and Ross; is that correct?

A. That is right.

Q. Then do you know where the hopper went after Mr. Hahn's injury?

A. Yes.

Q. Where did it go?

A. It went to Cathalamet, Washington.

Q. And did you tow the barge out that took it to Cathalamet?

A. Yes, we did.

Q. And was it towed out on the barge on which the hopper was when Mr. Hahn was injured? I don't know whether I stated my question very well here.

When the hopper was towed out was it on the same barge that Mr. Hahn was at the time he was injured?

A. Yes.

Mr. Denecke: I think that is all, your Honor.

The Court: Mr. Butler?

Mr. Butler: No further questions.

[fol. 87] The Court: That is all; you are excused.

(Witness excused.)

Mr. Schwab: If the Court please, for the record the plaintiff and the defendant have stipulated that the life expectancy of Mr. Hahn at the time of the injury, March 23rd, 1955, was 16.43 years, and that the testimony concerning his bills in the amount of $342, that is medical bills and medical expenses, are reasonable amounts.

It is also stipulated that the defendant Ross Island Sand & Gravel Company was the owner of the hopper in question on March 23rd, 1955, and that the company was in charge of the loading operations going on at the time of the injury.

Mr. Denecke: So stipulated, your Honor.

The Court: Let the record so show.

Mr. Schwab: And the plaintiff rests.

Plaintiff Rests

Mr. Denecke: Your Honor, I would like to have permission for Mr. Kudzia and Mr. Rich, whom the plaintiff called, to be excused.

Mr. Schwab: That is all right.

The Court: Very well; you two gentlemen can leave if you have to go back to work.

Mr. Denecke: Did the plaintiff rest?

The Court: Plaintiff rests, yes.

Mr. Denecke: The defendant will call Mr. Muirhead, your Honor.

[fol. 88] Defendant's Testimony

Walter H. Muirhead was thereupon produced as a witness in behalf of defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Denecke:

Q. Your name is Walter Muirhead?

A. That is correct.

Q. And you are a resident of Portland, Oregon?

A. I am.

Q. Would you state what position you hold with Ross Island Sand & Gravel?

A. I am president of Ross Island Sand & Gravel.

Q. Mr. Muirhead, yesterday during this trial and last evening you were absent from the trial supervising the pouring of concrete on the Ross Island Bridge, were you not?

A. The Morrison Street bridge.

Q. Or the Morrison; excuse me.

A. That is right.

Q. Mr. Muirhead, how long have you been associated with Ross Island Sand & Gravel Company?

A. Since 1926.

Q. How many tugs or towboats does Ross Island Sand & Gravel Company now own?

A. Three.

Q. And, Mr. Muirhead, where do those tugs operate?

A. On the Willamette and Columbia Rivers.

Q. And do those tugs operate to and from the body of [fol. 89] water lying between Hardtack and Ross Island?

A. Yes; all of their work originates there.

Q. Originates or ends there; is that correct?

A. Yes. They start from there and take loads away and bring empties back.

Q. Now, Mr. Kudzia described the ROSS ISLE. Generally what size are the other two tugs?

A. Well, the ROSS ISLE is a 65-foot tug; Mr. Kudzia is a few feet short. He has been on the tug just a few years, but it is a 65-foot boat. One of the other boats is a 38-foot boat, and the other a 36-foot boat.

Q. And do you know what the——

A. All capable of towing barges.

Q. Do you know what the draft is of any of these tugs?

A. The big boat draws about nine feet.

Q. Do you know about the other two?

A. The other two are shallow-draft boats, what they will use for pulling log rafts around the river and coming

up close to the beach. We have quite a bit of that work to do around our properties there.

Q. And does——

A. They draw from—oh, around three and a half feet.

Q. Does Ross Island Sand & Gravel Company also own some barges?

A. Yes, we have ten barges.

Q. And those barges are used for what?

A. Moving of our products to customers.

Q. Now, in the area of water lying between Hardtack [fol. 90] and Ross Island are there log rafts moored?

A. Yes.

(Photograph was marked Defendant's Exhibit 25 for Identification.)

Q. Mr. Muirhead, I hand you Defendant's Exhibit 25 for identification and ask if you will state generally what that is, just generally?

A. Well, that is the picture of the Ross Island harbor.

Q. And do you know approximately when this was taken?

A. Well, I have these taken about every 90 days and I couldn't tell when this one was taken. We take them to show the condition and the number of rafts in and the condition of our stockpiles, we have an aerial photographer come over regularly, and also to show the height of the water, so I couldn't identify the exact time this was taken. I could by getting Brubaker, our photographer, and he could identify it from that number if it was desirable.

Q. Is that, however,——

A. I can tell you that it was taken within the last three or four years by the degree of excavation here. We dig—been excavating that island, and judging from the distance we are back, why, it is within the last three or four years. The land used to be way out here.

Q. And is it an accurate representation of what it appears to be there?

A. Exactly.

Q. Now, as far as these log rafts——

[fol. 91] OFFER IN EVIDENCE

Mr. Denecke: Your Honor, I will offer in evidence Defendant's Exhibit 25 for identification.

The Court: Any objection?

Mr. Schwab: I am just wondering about the purpose of the offer.

Mr. Denecke: Well, primarily it is a closer-up view of the same thing as shown in a high aerial photo in your 4. Your Honor can take a look here.

Mr. Schwab: We have no objection.

The Court: It will be received.

(Photograph received in evidence as Defendant's Exhibit 25.)

By Mr. Denecke:

Q. Now, as far as these log rafts in this body of water—and when I refer to body of water I am referring, Mr. Muirhead, to the water lying between Ross and Hardtack Island—the log rafts in there are brought in by whom? I don't mean the names of the persons but the class of persons.

A. Oh, various towboat companies.

Q. Various towboat——

A. Most of the towboat companies operating on the upper river operate into there, the Ramona Towboat Company, Stryker, the Mirene Company and, oh, I can't tell you the names of the others. We deal with the owners—with the owners of the logs in many cases, and sawmill companies, for the moorages. Knappton Towboat is one of the larger ones; they operate from the mouth of the river up to Portland; and then these other fellows operate [fol. 92] from Portland up to Oregon City locks where they pick up these rafts, most of them come from Albany and Salem vicinity.

Q. Now, Ross Island, Mr. Muirhead, charges a fee or a—they charge something to the owners of the rafts for mooring them there; is that correct?

A. So much a raft, yes, sir, per month.

Q. And as far as the rafts close into shore, are they anchored onto something on the shoreline there?

A. There are piling along here at different places that they tie to. Also we have some anchors out in the water that they tie to that are heavy concrete blocks down on the bottom, and in some cases they use a convenient tree, a large cottonwood.

Q. Ever since 1926, Mr. Muirhead, which is my recollection when you stated you became associated with Ross Island, has the water between the two islands been used by tugboats or boats of that general description?

A. Well, the first thing we did—it will show in one of the pictures here—we went up to the head end of the area and built a dike across, and of course to do that we had to tow a large dredge up there.

Q. And was that towed up through this——

A. Yes.

Q. —this body of water between the two islands?

A. That is correct. That was the first construction work that Ross Island did when they started to build their plant.

Q. Mr. Muirhead, do you know whether or not the Coast [fol. 93] and Geodetic Survey boat comes into this body of water between the two islands and makes soundings?

A. Yes; they come in regularly; and the Harbor Patrol patrols it regularly.

Q. In the summertime, particularly in the summer or spring and fall, Mr. Muirhead, when the weather is fairly good, particularly on week-ends, what do you frequently observe on the waters there between Hardtack and Ross Islands?

A. I don't believe I understand that question.

Q. Well, are the waters used between the two islands there, and I am speaking particularly in the summertime, by people other than towboats coming in with log rafts and tugboats bringing in barges and taking out barges? Are the waters used by any other class of persons?

A. Oh, yes, people cruising about in their private boats, cruisers in the range of 30-35 feet come up occasionally, and many, many fishermen and smaller craft come up on week-ends, anchor up there and fish over Saturdays and Sundays in certain areas where they have found fish plentiful.

Mr. Denecke: That is all, your Honor.

Cross examination.

By Mr. Schwab:

Q. Mr. Muirhead, you were testifying as to logs that you moor up there in that lagoon. What charge do you make for that?

A. Oh, it is not a fixed charge. We have leases with the Shaver Transportation Company—by the way, that is one [fol. 94] I forgot to mention there, they are one of the largest in the river; they have many thousands of feet leased around our area, including some of the east shore of Ross Island, and we charge them one fee.

Q. What do you charge them?

A. They pay $500 a month flat and then a proportionate amount, I can't recall the figure because we have so many, but for illustration it would be $500 a month permitting 12 rafts, let's say, and then it would be so much a month per raft in addition to that. We have that same deal with the Mirene Company and the same deal with Jones Lumber Company, which is a firm on the Macadam Road out here, one of the oldest lumber companies in Portland; we have had a deal with them for years.

Q. Jones was formerly owned by B. P. Johns, wasn't it?

A. No, no; it was formed as Jones. Johns might have had some interest in it in recent years, but it has always been Jones.

Q. Wasn't B. P. Johns president of the company?

A. He might have been in recent years, but recently he had nothing to do with it. He was an official of the Doernbecher Manufacturing Company making furniture out in Sulivan's Gulch.

Q. Are you acquainted with his son-in-law, Mr. Minton?

A. No, I am not. I knew his son.

Q. In talking about Shaver I think you said they paid $500 a month for——

A. They paid figures from two hundred up to five hun- [fol. 95] dred, it may even be five-fifty, different amounts. I can't recall all those financial matters.

Q. That was a fixed amount each month, was it?

A. Please?

Q. That was a fixed amount they paid each month, was it?

A. Oh, yes.

Q. For leasing that portion of the lagoon?

A. They don't have—they don't have areas in the lagoon; they have areas coming up to the mouth of the lagoon.

Q. Well, I am talking about the area between the two islands.

A. Well, I am not. You asked me what they got for log rafts. We moor all along the island. The people that moor inside moor outside, and they switch around.

Q. I am talking, Mr. Muirhead, about the area only between the two islands. We are not in this case interested in—there is no relevancy particularly in what was going on outside. Now, has your testimony been as to what you charge or what you allow to be rafted outside of the area of between the two islands?

A. That came about when I mentioned that the Shaver Transportation Company also towed in and out of there and that we had moorage rights with them; that was my last statement of one of the people with whom we do have moorage dealings.

Q. Now, does Shaver——

A. They do go in and out of there with rafts, because these rafts are interchanged between owners. In other words, for example, a raft will come down and it will be- [fol. 96] long to one firm when it comes down, and they will sort it on our property and pick from the raft peeler logs and the peeler logs will go perhaps to Weyerhaeuser in Longview, and then the sticks will go to a mill called Stebco over at Vancouver near the Aluminum Company.

Q. Now, is this——

A. And some of them will be sorted out and end up as piling.

Q. Does this go on in the area of the lagoon?

A. That is right.

Q. All right. Then they have——

A. Quite a bit of activity in there.

Q. That is all we are talking about here——

A. That is correct.

Q. —what goes on in the lagoon.

A. Correct.

Q. Now, my original question there concerning Shaver, you said something about them paying $500 a month. Is that for moorage that is done inside the lagoon?

A. No, that isn't correct; that isn't what the—as I told you he came up to the mouth of the lagoon. You asked me what Shaver Transportation paid us and I told you. You didn't ask me the location of the area in which he paid five hundred.

Q. Now——

A. So ask your questions correctly and I will answer them.

Q. Does Shaver moor logs inside the lagoon?

A. No, he does not.

Q. All right, then; that is all we are interested in.

[fol. 97] A. Well, then, ask your questions that way and I will answer them.

Q. I believe you testified on direct examination in answer to a question by Mr. Denecke that there were logs moored inside the lagoon?

A. Correct; but not by Shaver.

Q. The picture shows that there were logs moored inside the lagoon.

A. That is right.

Q. Now, who moors logs inside the lagoon?

A. The Mirene Company and the Knappton Towboat Company and the Jones Lumber Company.

Q. And what do you charge them for moorage?

A. I can't tell you exactly, but $400, $350, $22.50 a raft, $27.50 a raft, and depending how many rafts are in there, is what we get per month from them gross total.

Q. In other words, you charge them according to the number of rafts they have?

A. That is correct. Quite a substantial income from it.

Q. And they don't pay for moorage rights——

A. Yes, they do.

Q. —just on a flat basis?

A. Yes, they do.

Q. Oh, they do?

A. Yes.

Q. What is the flat basis they pay?

A. I told you three hundred, three hundred fifty, four [fol. 98] hundred a month, then so much a month in addition to an allowable amount of 10 or 12 rafts.

Q. Is it my understanding then that this flat fee is payable whether there is a raft in there or not?

A. That is correct.

Mr. Denecke: Excuse me, your Honor. I am going to object to any further questioning along this line. How much they pay here is not relevant to any question that that jury has or that the Court has in this matter.

Mr. Schwab: Well, this whole matter has been brought up here, your Honor, by the defendant, and since he has gone into it——

The Court: I appreciate that, but get down to the question whether or not the Ross Island Company was negligent here. What they are collecting for mooring rafts in there isn't going to make any difference.

Mr. Butler: The manner of payment, however, is relevant, your Honor, in terms of the question which will have to be decided by the Court. I think that was your purpose in bringing it out originally.

The Court: Don't you think you have pursued it far enough?

Mr. Schwab: I think probably so.

Q. Are these log rafts that are brought in by these towboats that you testified to—and I am talking about the lagoon only—are they left there sometimes for some months?

A. Well, they are usually brought in in the fall; they are [fol. 99] stored in there, of course—the heaviest period of storage is when we have the freshets on the Willamett (sic) River such as October, November, December; any time the Willamette is about to get up to a dangerously high velocity, why, they really crowd us. Sometimes we do not have room enough to work gravel because they want to get into a safe harbor where the current won't tear them from their moorings.

Q. Mr. Muirhead, are you familiar with the hopper that is involved in this case?

A. Yes, I am generally familiar with it. I didn't see it at the time of the accident or afterwards.

Q. Now, there has been some testimony in this case that that hopper had been up around the Camas area, I believe, or the Sandy River. What had it been used for up there?

A. I think we unloaded about ten or twelve barge loads up there that went to the Oregon State Highway Department for maintenance rock, maintaining the highway between Troutdale and Cascade Locks.

Q. In other words, it was used for the purpose of unloading gravel into trucks up there?

A. Crushed rock.

Q. Yes. And do you know for what purpose it was being sent to—I believe it was Cathalamet or Kalama?

A. Yes; it was being sent down there to deliver rock to Wahkiakum County, Washington for their roads.

Q. In other words, as soon as the hopper was gotten down there to wherever it was going to it was going to be [fol. 100] put into active service; is that correct?

A. Yes; it worked quite regularly.

Q. Are you familiar, Mr. Muirhead, with the provisions of the Oregon law concerning how ladders, fixed ladders, are supposed to be fixed to the building or structure which they are servicing?

A. I have——

Mr. Denecke: Your Honor—excuse me just a moment—your Honor, I object to this line of questioning unless the plaintiffs are now ready to use Mr. Muirhead as rebuttal. It certainly is beyond the scope of any examination of mine.

The Court: Objection sustained.

Mr. Schwab: Well, for the purpose of this question, your Honor, we will make Mr. Muirhead our witness.

The Court: Very well.

Mr. Schwab: Do you have the question, Mr. Muirhead?

The Witness: Yes. Didn't I answer that?

The Court: I interrupted you. You better read the question back to him.

(Last question read.)

A. I have read them so I presume I am aware of them.

Q. Are you familiar with the regulations of the Safety Code, Oregon Safety Code?

A. We are regularly inspected by the Oregon State Industrial Accident Commission.

Q. Well, now, Mr. Muirhead, are you familiar with the hopper in question here?

[fol. 101] A. Well, it is under my control. I have watched it work at numerous times; I have watched it work at Sun Dial beach and I have watched it work at various other points.

Q. Let me show you Plaintiff's Exhibit 5. Does that appear to be the hopper in question?

A. That is it.

Q. Let me ask you this now, Mr. Muirhead——

A. I think we have three like that and I presume the picture is of that one. I didn't know, I didn't take the picture. We simply have three.

Q. When was it the intention, if you know, Mr. Muirhead, of the company bolting the ladder in question which was used here to go up to the top of the hopper and the side of the hopper?

Mr. Denecke: I object to that.

A. I didn't hear that.

Mr. Denecke: Excuse me. Of what materiality, relevancy or what competency, your Honor, would be when was the intention of bolting it?

The Court: Read the question back to me.

(Last question read.)

A. In regard——

The Court: Just a minute, Mr. Muirhead. You are asking when they formed an intention to bolt it?

Mr. Schwab: Yes, when they intended to have it bolted.

The Witness: Can I answer that one, Judge?

The Court: He may answer.

A. That hopper and those hoppers, I am sure, were built [fol. 102] before the requirement of bolting ladders to hoppers.

Q. How old was this hopper?

A. I think the hopper was built in about 1940, as near as I am able to—'40 to '42, as near as I have been able to get from our personnel at the plant.

Q. I see.

A. And so its age would be about 13 years or so at the time of this accident.

Q. Well, this happened in '55.

A. Which is not unusual at all for a hopper. I think we are depreciating them on the basis of 20 or 25. You understand they are subjected to quite severe treatment; they get hit with the bucket, the cranemen are swinging the bucket from a barge over like this and dumping it——

Q. Yes.

A. —and in the handling the bucket hits the corners of the hopper and breaks off a timber or two and then when the hopper comes in we replace the timber and it is under a continual state of being altered from its original condition.

Q. Mr. Muirhead, you mentioned the cement blocks or cement——

The Court: He is not your witness any longer now?

Mr. Schwab: No.

The Court: Very well.

Mr. Schwab: I would like to be released from that, your Honor.

The Court: All right.

By Mr. Schwab:

Q. You mentioned the cement blocks or the cement struc- [fol. 103] tures that you had in the lagoon area there for the purpose of mooring these barges; is that correct?

A. Well, I mentioned that we have anchors.

Q. Yes.

A. Just exactly what form those take, how many are blocks, how many of them are large chunks of crusher

parts, anything that will hold a line adequately to moor a log raft, we tie our barge to some, but I can't tell you the form of the blocks.

Q. In connection with your operations on the lagoon there, your dredging operations, your mooring operations, any other operations you may carry on, do you have occasion to drive piling in the lagoon?

A. Oh, yes; we have driven many piling there.

Q. Does it appear in various places in the lagoon, the piling?

A. Please?

Q. The piling that you have driven in there, has it been driven in in various places in the lagoon?

A. Oh, yes. Our plant is literally on hundreds of piles, five, six, seven hundred piles we have around in there on various places.

Q. Various places?

A. The plant rests on pile; in places we will have fifty pile to hold just one corner up. Then we have scattered small ones over—some places to tie up a line to hold a dredge, other places to keep log rafts from drifting into the beach. We have sometimes 3-foot tides in some places; [fol. 104] we have pile driven in just to keep the logs from going in and getting high and dry on the beach and the boys couldn't pull the rafts off if they wanted to. We have them in for various purposes.

Q. Now you mentioned that your plant there—I assume you meant your crushing plant by that; is that where you are talking about?

A. Crushing and screening plant.

Q. Crushing and screening plant?

A. Uh-huh.

Q. You say that is on about 700 piles?

A. Yes, or more.

Q. And that was actually built then in an area, I assume, that was formerly part of the lagoon?

A. Part of it is, yes. We had to get—we had foundation problems for very heavy equipment, you know, severe vibration in crushers, and wherever that necessitated we put down more pile. Some places we will just pour concrete if the surrounding terrain is sufficient to hold up the load.

Q. Now, you have right near the crusher and screening plant there out in the water leading into the lagoon a rather large structure. What is that?

A. Well, that is the tramway terminal.

Q. That is the tramway terminal?

A. That is the device that takes our rock from there over to our plant on McLaughlin Boulevard. We call it the loading terminal. It probably has several hundred piles under it.

[fol. 105] Q. Now, that was built about how long ago?

A. That was built in '26.

Q. That was built in '26?

A. Built of wood.

Q. And what is the method of getting the rock or the sand and gravel into that tramway terminal there?

A. Belt conveyor.

Q. A belt conveyor takes it from the terminal over to the land plant, is that it?

A. Right is right.

Q. Is that the method that you use for getting all of the sand and gravel over to your land plant at McLaughlin Boulevard, or do you have other methods?

A. No, that is the sole method.

Q. In discussing this last aerial photo that was put in here, Exhibit No. 25, I think you said you could tell it was taken within the last three or four years by the amount of digging that had been done since that time?

A. Yes. Where those rafts at the right-hand side are moored, that is the excavated area.

Q. You are talking about right here (indicating on exhibit)?

A. That is correct. We are slicing that off by cutting towards your right arm—no, start up the other way towards you.

Q. This way (indicating)?

A. That is right. We are slicing that off and our dredge works progressively from one end to the other slowly cutting into the main island, clear up to the dike which is way [fol. 106] up here; the dredge goes up that way and makes a slice, goes back and makes another, and we are working that way. The land used to be way out in here.

Q. Now, this island here is Hardtack, isn't it?

A. Yes.

Q. And you are continually slicing away at it, are you?

A. Uh-huh.

Q. Dredging it off?

A. Uh-huh.

Q. I assume you are also dredging off the bottom of the lagoon also?

A. A hundred feet deep in places.

Q. Now, in the area that it is a hundred feet deep now, way back in,—when you started, I suppose, it was quite shallow, wasn't it?

A. Well, most of that area is about 20 feet above—in the part we are digging now was from 12 to 20 feet above zero water stage, it had big cottonwoods; we have taken big oak timber off four feet in diameter.

Q. What do you mean by "zero water stage"?

A. That is datum used here by the U. S. Engineers for all harbor construction, zero stage of the Willamette River.

Q. Does that mean the mean average or——

A. No. We have the mean average from mean average high, but then we also have the zero stage. We have minus zeroes like at the beach, if you are familiar with the tides, go clam digging, you have heard of low tides, it will be a [fol. 107] foot below zero, one foot six below zero. It is the same theory here on the Willamette as they have at the beach.

Q. I see. Do you moor any pleasure crafts in the—pleasure craft, that is pleasure boats, in the lagoon there?

A. Only very occasionally; the company boat is kept there occasionally. I have a small launch that I use to go sometimes from shore to the islands and occasionally down the river for inspections, and once in a while I keep it over there.

Q. Something like a captain's launch on a ship?

A. Yes, about like that.

Q. Now you mentioned pleasure craft coming into the lagoon area there on week-ends. Do they come in during the week also?

A. Very seldom; very seldom. Those people usually are——

Q. Working people?

A. —are out for recreation on Saturdays and Sundays.

Q. Well, if pleasure craft want to come in there while you are conducting certain loading or crushing or digging operations there, do you allow them to come in?

A. Well, we can't stop them.

Q. Well, if they want to come in there, say, when you are having a loading problem going on at the crushing plant, do you allow them to come in?

A. We have no control over them at all; they would come and go at will. We have to—we have to control our operations according to the rules of navigation on the river; they would keep away from our vessels and we keep away from them. We would be subject to marine damages if we had——

[fol. 108] Q. I am talking about the lagoon area now.

A. That is what I am talking about.

Q. Do they go clear up to the end of the lagoon?

A. Oh, yes, and tie their boat up and go up in the brush there and pick flowers.

Q. Have you ever had any accidents in there?

A. Please?

Q. Have you ever had any accidents in there?

A. Yes, we have.

Q. Involving pleasure craft?

A. No, no. We may have had but I—I don't recall them; none that I know of.

Q. Well,——

A. We had an accident with a barge turning over and we got into court on that.

Q. One of your own barges?

A. In the lagoon.

Q. One of your own barges?

A. Yes; one that we had at that time leased; it was being towed by another company, Portland Tug and Barge Company.

Q. You were mentioning about anybody coming in there or going out at pleasure. Is it your position that anyone could come in there and tie up a log raft?

A. No, they could not; we would run them off.

Q. Could anybody come in there and tow a log raft in and leave it there for a month?

A. If they didn't tie to shore, why, we would have no way [fol. 109] to stop them; it is navigable water.

Mr. Schwab: Well, I move that remark be stricken, your Honor.

The Court: The last part of the witness's answer will be stricken.

By Mr. Schwab:

Q. How about these log rafts that are tied out from shore some distance to these cement blocks that you were mentioning? Take this Exhibit 25 again, and looking at this raft right here how far would you say that was from shore?

A. Well, those rafts are about 50-60 feet wide. You can count it off there, one, two, three, four five, six; they are probably out three hundred fifty, sixty feet from shore.

Q. That is about 350 or 360 feet?

A. Sometimes that is a solid mass of rafts and we have to call them and ask them to come up and move their rafts so we can conduct our operations.

Q. I see.

A. We can't get a barge up between the rafts. Once in a while the wind will take them and blow them across and block the whole area.

Q. How wide would you say it was from this point over to this point (indicating)?

A. Couple thousand feet.

Q. Do you ever have——

A. Close to a half a mile at the extreme.

Q. Do you ever have rafts moored out right in the middle there?

[fol. 110] A. As I say, I have had them blocked so we couldn't get through.

Q. Now, what are those tied to——

A. Each other.

Q. —that are out in the middle?

A. Each other.

Q. Tied to each other?

A. Just like you take one boat alongside a dock and just

build them out in the stream until they were out there six deep.

Q. Where are these cement blocks?

A. I couldn't tell you. There are various mooring things we have scattered down there. Some, I think, are even lines from shore; I wouldn't know. The crew knows. I do know we have some down in here and one or two over in there.

Q. That is for the purpose of tying up these rafts?

A. No; those are put in there primarily for our own facilities to move our cranes with, to hold our floating equipment stable in the river.

Q. Your testimony was, I believe, that you did tie rafts to these cement blocks.

A. They do; I don't. I have nothing to do with that. If they want to tie to them they tie to them. When they are in our way I ask them to move.

Q. If somebody came up there and tied to one of those cement blocks and just left it there and didn't pay you a fee, what would you do about it?

[fol. 111] A. I would ask them to untie them and move away.

Mr. Schwab: That is all; thank you.

Mr. Denecke: No further questions.

(Witness excused)

Mr. Denecke: The defendant rests, your Honor.

Defendant Rests

The Court: Any rebuttal?

Mr. Schwab: No rebuttal, your Honor.

The Court: Do you have an amended Reply you are going to file?

Mr. Butler: Yes, we do, your Honor.

The Court: How long do you gentlemen figure the arguments are going to take; I mean on the motions you are going to make now?

Mr. Denecke: I think, your Honor, it will take to noon.

The Court: Probably.

Mr. Denecke: Between the two of us.

The Court: I was just going to let the jury know; there is no need to keep them aroun l here.

Ladies and gentlemen of the jury: The case is concluded as far as the testimony is concerned. There will be some motions and arguments which have to be made to the Court out of the presence of the jury, so as far as the jury is concerned you will take a recess to 2 o'clock this afternoon.

(Whereupon, at 10:40 A. M. the jury was excused, and the Court and respective counsel retired to chambers where the following proceedings were had out of the presence of the jury:)

[fol. 112] DEFENDANT'S MOTION FOR A DIRECTED VERDICT

Mr. Denecke: The defendant moves the Court to direct a verdict for the defendant on the grounds and for the reason that the evidence in the case shows that the plaintiff was injured on the navigable waters of the United States and that the plaintiff is otherwise within the purview of the Longshoremen and Harbor Workers' Compensation Act by reason of the fact that he was not a master or a member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons, and that the defendant had secured the payment of compensation under the Longshoremen and Harbor Workers' Act in a manner provided for in said Act, and that said Act provides that the sole and exclusive liability of the defendant for any injuries which the plaintiff may have incurred is that liability provided for under the Longshoremen and Harbor Workers' Compensation Act; and furthermore that the Compensation Act of the State of Oregon is not applicable because of the work in which the plaintiff was engaged at the time and because the injury occurred upon the navigable waters of the United States.

That is all the motion.

(Further argument and discussion off the record until a recess was taken to 2:00 P. M. of the same day.)

[fol. 113] (Friday, February 10, 1956, 2:00 o'clock P. M., pursuant to recess, proceedings were resumed in chambers, out of the presence of the jury, as follows:

RULING OF THE COURT

The Court: Gentlemen, after listening to your arguments and reading your authorities and studying them some more, and listening to the testimony in this case, the Court is of the opinion that this accident happened on navigable waters of the Willamette River.

The Court is further of the opinion that the uncontradicted testimony shows that the defendant Ross Island Sand & Gravel Company was engaged in interstate commerce, and I fail to see where it comes within the twilight zone following the Martinson case. I think Mr. Hahn's remedy is under the Longshoremen and Harbor Workers' Act, so I am going to allow the motion for directed verdict and allow an exception.

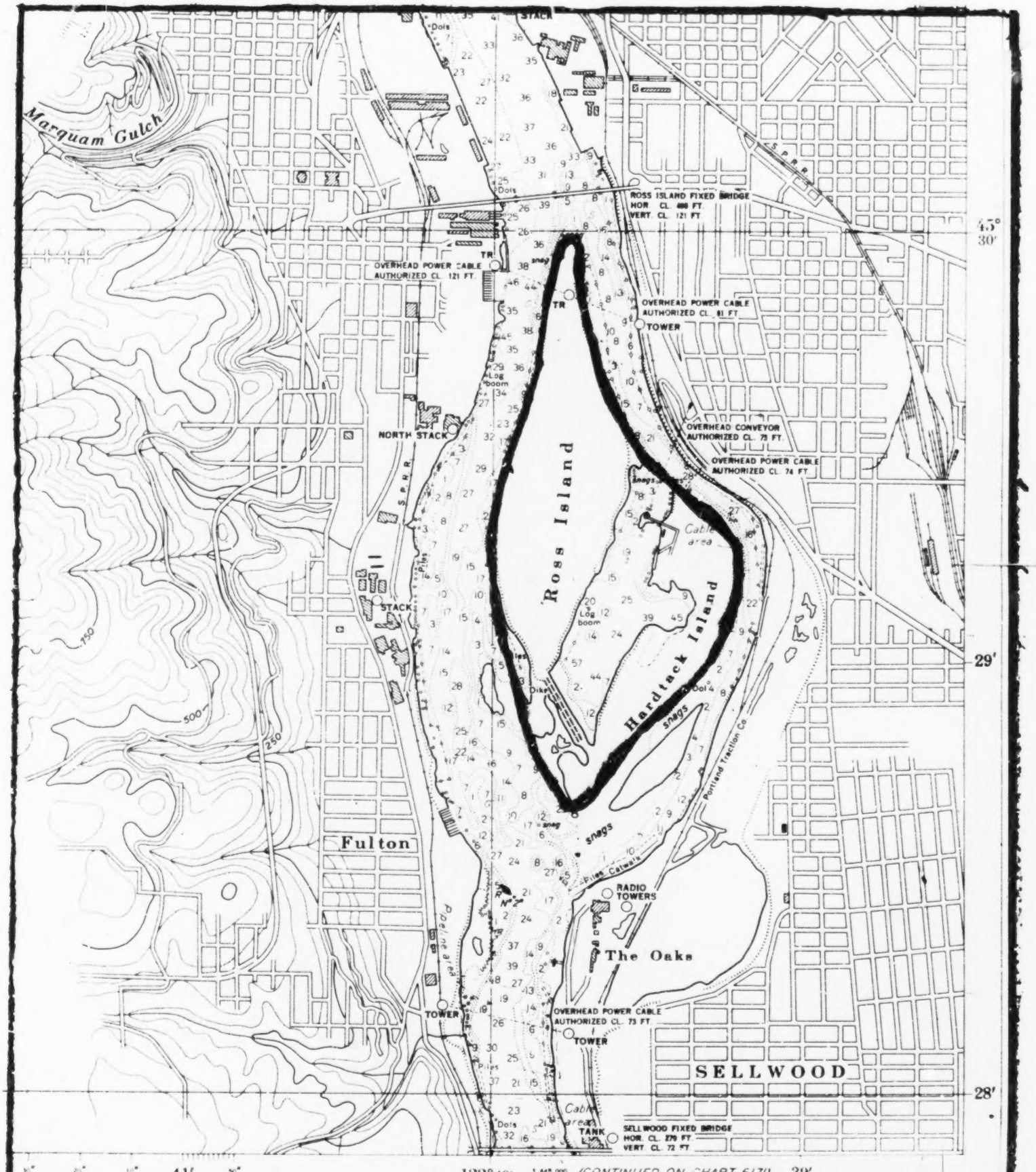
Mr. Schwab: Your Honor, we would like to have the matter submitted to the jury under the rule so we can get a jury determination.

(Discussion among the Court and counsel regarding plaintiff's motion.)

The Court: I will allow them to present the case to the jury with the understanding if the verdict comes in for the plaintiff I will set it aside and grant a verdict for the defendant, and allow an exception.

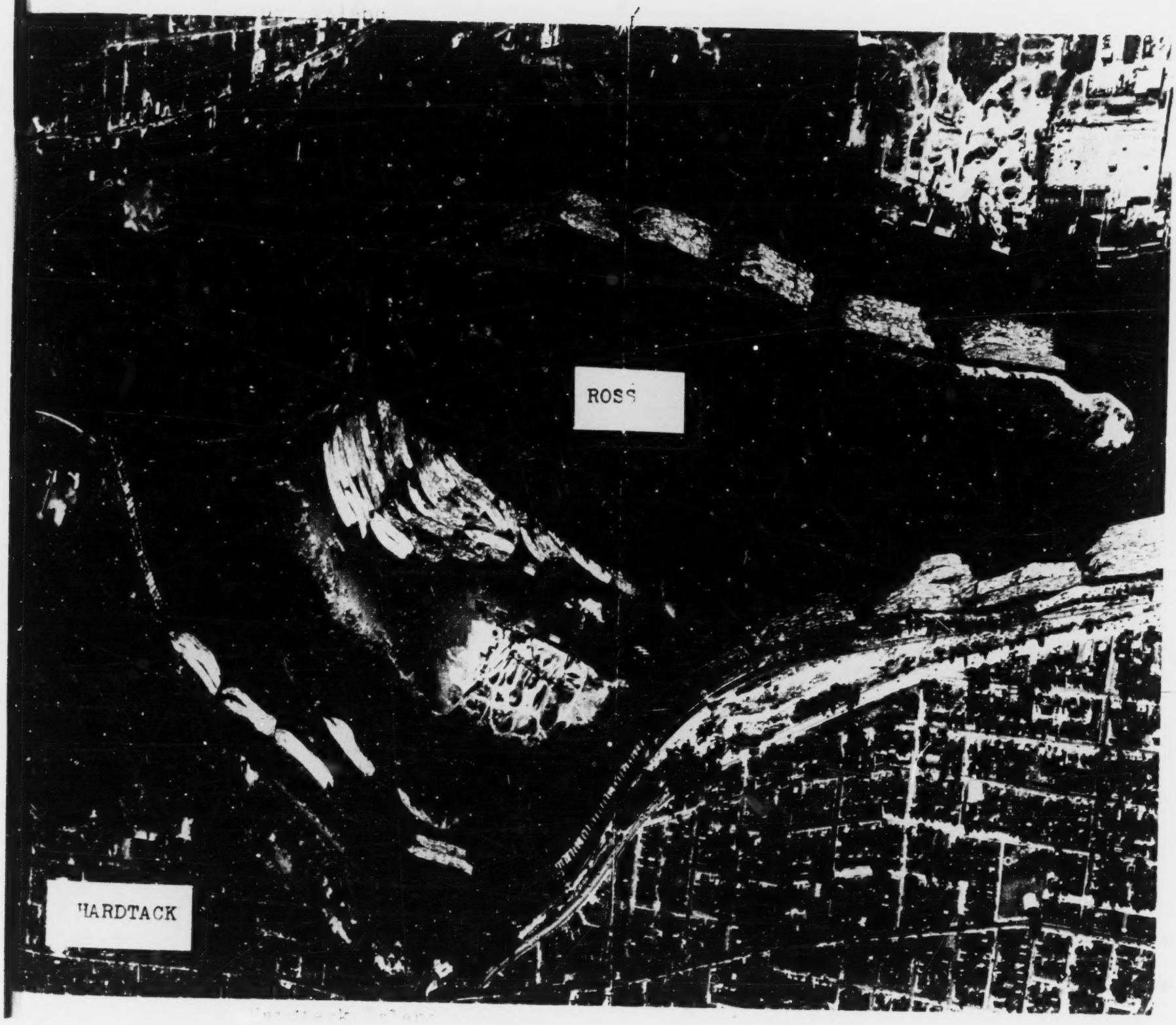
(Whereupon, closing arguments were presented to the jury by respective counsel, after which the Court instructed [fol. 114] the jury as to the law and the jury retired to deliberate upon its verdict.)

[fol. 115] Court Reporters Certificate to foregoing transcript (omitted in printing).


Marquam Gulch
STACK
Dols
S.P.R.R.
ROSS ISLAND FIXED BRIDGE
HOR. CL. 400 FT.
VERT. CL. 121 FT.
45°
30'
TR
OVERHEAD POWER CABLE
AUTHORIZED CL. 121 FT.
TR
OVERHEAD POWER CABLE
AUTHORIZED CL. 81 FT.
TOWER
Log boom
NORTH STACK
OVERHEAD CONVEYOR
AUTHORIZED CL. 75 FT.
OVERHEAD POWER CABLE
AUTHORIZED CL. 74 FT.
Ross Island
Hardtack Island
Cattle area
STACK
Piles
Log boom
Dikes
29'
750
500
250
snags
Portland Traction Co
Fulton
Piles Catwalk
RADIO TOWERS
The Oaks
Pipeline area
TOWER
OVERHEAD POWER CABLE
AUTHORIZED CL. 73 FT.
TOWER
SELLWOOD
28'
Cable area
TANK
SELLWOOD FIXED BRIDGE
HOR. CL. 270 FT.
VERT. CL. 72 FT.
41'
122°40'
1:445,000
(CONTINUED ON CHART 6171)
39'

[fol. 115B] EXHIBIT 4

(See Opposite)☞


ROSS
HARDTACK

[fol. 115C] EXHIBIT 10

(See Opposite)☞

[fol. 115D] EXHIBIT 25

(See Opposite)☞

[fol. 115E]

EXHIBIT A

Deed Book 60 Page 304.

The United States of America	)	
to	)	PATENT.
Rebecca F. Ross, widow,	)	

Dated May 5, 1873.

(Recorded November 20, 1882.)

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States, a Certificate Numbered 3122 of the Register and Receiver at Oregon City, Oregon, whereby it appears that under the provisions of the Act of Congress approved the 27th day of September 1850, entitled "An Act to create the Office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and to make donations to settlers of the said Public Lands" and the legislation supplemental thereto, the claim of Rebecca F. Ross, widow, and the heirs at law of Sherry Ross, Deceased, late of Multnomah County, Oregon, Notification No. 582 has been established to a Donation of one section or six hundred and forty acres of land and that the same has been surveyed and designated as claim number 90 being parts of Sections 10, 11, 14 and 15 in Township 1 South of Range 1 East, according to the Official Plat of survey returned to the General Land Office by the Surveyor General, being bounded and described as follows, to wit:

(SEAL)

Beginning at the Meander post between said sections 10 and 15, and running thence North 21° East 15 chains and [fol. 115F] 60 links; thence North 12° 30′ East 25 chains and

80 links; thence North 5° 30′ East 5 chains and 70 links; thence south 28° East 4 chains and 50 links; thence south 21° East 16 chains and 40 links; thence south 23° East 13 chains; thence south 25° East 4 chains; thence south 12° East 6 chains; thence South 59° and 15′ East 12 chains and 50 links; thence South 50° 30′ East 7 chains and 80 links; thence South 26° East 5 chains and 10 links; thence south 1° and 30′ West 21 chains; thence south 35° West 30 chains and 20 links; thence south 45° West 6 chains; thence south 51° West 7 chains and 20 links; thence North 63° West 1 chain and 65 links; thence North 28° and 15′ West 20 chains and 80 links; thence North 66° West 1 chain; thence North 19° and 30′ West 4 chains; thence North 13° West 6 chains and 30 links; thence North 29° and 30′ West 8 chains; thence North 13° West 4 chains and 92 links; thence North 18° and 30′ West 3 chains; thence North 12° West 6 chains and thence North 11° East 15 chains and 40 links to the place of beginning in the district of lands subject to sale at Oregon City Oregon, containing 297 acres and 59 hundredths of an acre.

Now know ye, That the United States of America, in consideration of the premises and in conformity with the provisions of the act aforesaid have given and granted and by these presents do give and grant unto the said Rebecca F. Ross, widow, and to her heirs the West half and unto the heirs at law of the said Sherry Ross, deceased, the East half of the tract of land above described.

To have and to hold the said tract, with the appurtenances unto the said Rebecca F. Ross, widow and the heirs at law of the said Sherry Ross, deceased, and to their heirs and assigns forever, their respective portions as aforesaid.

(Seal)

[fol. 115G] In testimony whereof, I, Ulyssus S. Grant, President of the United States, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this 5th day of May in the year of our Lord One thousand Eight hundred and seventy three and of the Independence of the United States the 97th.

By the President: U. S. Grant

By: F. D. Williamson, Secretary.
C. B. Boynton, Recorder of the General Land Office.

(Seal of the General Land Office)

Recorded Vol. 9, Page 324.

Received for Record November 20th, 1882 at 2:P.M.

No. 7687

State of Oregon, }
County of Multnomah, } ss.

I, Si Cohn, County Clerk, Ex-Officio Recorder of Conveyances and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, which Court has exclusive jurisdiction of all probate proceedings in said County, do hereby certify that the foregoing copy of Patent (Deed Book 60 at page 304) The United States of America to Rebecca F. Ross, Widow

has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Patent as the same appears of record in my office and in my custody.

(Seal)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 7th day of February, A. D. 1956.

Si Cohn, County Clerk.
By /s/ M. Allen, Deputy.

[fol. 115H]

EXHIBIT B

G B #40044

ELROD ET UX TO ROSS ISLAND SAND & GRAVEL CO.

KNOW ALL MEN BY THESE PRESENTS That J O Elrod and Minerva L Elrod, husband and wife in consideration of Ten ($10.00) Dollars to them paid by Ross Island Sand & Gravel Co do hereby grant, bargain, sell and convey unto the said Ross Island Sand & Gravel Co., and unto its successors and assigns, all their right, title and interest in and to the following described parcel of real estate, situate in Multnomah County State of Oregon to-wit;

All of the Donation Land Claim of Sherry Ross and Rebecca F Ross, his wife being Claim No 90 and being parts of Sections 10, 11, 14 and 15, Township 1 South of [fol. 115I] Range 1 East of Willamette Meridian, bounded as follows; Beginning at the meander post between said Sections 10 and 15 and thence North 21 degrees E 15.00 chains; thence North 12 degrees 30 minutes E 25.80 chains: thence North 5 degrees 30 minutes E 5.70 chains; thence South 28 degrees E 4.50 chains; thence South 21 degrees E 16.40 chains; thence South 23 degrees E 13.00 chains; thence South 25 degrees E 4.00 chains thence South 12 degrees E 6.00 chains; thence South 59 degrees 15 minutes E 12.50 chains; thence South 50 degrees 30 minutes E 7.80 chains; thence South 26 degrees E 5.10 chains; thence South 1 degree 30 minutes W 21.00 chains; thence South 35 degrees W 30.20 chains; thence South 45 degree W 6.00 chains; thence South 51 degrees W 7.20 chains; thence North 63 degrees W 1.65 chains; thence North 28 degrees 15 minutes W 20.80 chains; thence North 66 degrees W 1.00 chains; thence North 19 degrees 30 minutes W 4.00 chains; thence North 13 degrees W 6.30 chains; thence North 29 degrees 30 minutes W 8.00 chains; thence North 13 degrees W 4.92 chains; thence N 18 degrees 30 minutes W 3.00 chains; thence North 12 degrees W 6.00 chains; thence North 11 degrees E 15.40 chains to place of beginning excepting therefrom two (2) parcels heretofore sold and conveyed, to-wit:

1. Beginning on line between Sections 11 and 14 Township 1 South Range 1 East of Willamette Meridian 89 degrees 35 minutes E 713.57 feet distant from corner of Sections 10, 11, 14 and 15 and thence North 41.83 feet to harbor line of Willamette River; thence South 54 degrees E 1048.45 feet thence West 848.21 feet; thence North 574.43 feet to beginning, containing six (6) acres, together with all riparian wharfage and shore rights incident or appertaining to said premises sold to Portland Motor Boat Co.,

2. The North end of Ross Island beginning at a large ash tree located near the East bank of the main island, about 210 feet South from the North timber line on said island and on a line running Northwesterly to a large cottonwood tree on the West bank of said Island situate in Section 10 in Township 1 South of Range 1 East of Willamette Meridian heretofore conveyed to the Windemuth Amusement Company but nevertheless granting, transferring and conveying any and all rights, privileges and benefits reserved to the grantors under the terms of said deed

Lots Seven (7) and Eight (8) of Section Fifteen (15) in Township One (1) South of Range One (1) East of Willamette Meridian, containing 16.59 acres, more or less.

All of that certain tract of land described as follows; Beginning at a stake in the East line of the Portland and Milwaukie Macadamized road 65 links Southerly from the Southwest corner of the Brickyard tract in Section 15 in Township 1 South of Range 1 East of Willamette Meridian, running thence South 75 degrees 30 minutes E parallel with the South line of the Brickyard tract 8 chains and 15 links to low water on the Willamette river; thence along low water line South 40 degrees W 62 links; thence North 75 degrees 30 minutes W parallel with the South line of said Brickyard tract 8 chains and 24 links to the East line of said Macadamized road; thence North 30 degrees 64 links along the East line of said road to the place of beginning, containing one-half acre of land, it being a part of the Terwilliger Donation Land Claim, excepting therefrom two (2) parcels of land heretofore sold and conveyed described as follows;

(SEAL)

1. Commencing at the Northwest corner of land sold by James Terwilliger to John Kiernan on January 17, 1876 in said Donation Land Claim in Section 15, Township 1 South of Range 1 East of Willamette Meridian, thence Southerly on the East line of McAdam Road 10 feet; thence Easterly parallel with North line of said tract to low water mark in Willamette River; thence Northerly with [fol. 115J] said low water mark on said river 10 feet to Northeast corner of said tract; thence Westerly on North line of said tract to beginning; being strip 10 feet wide off tract sold by Terwilliger to Kiernan as aforesaid and extending from said road to river off North side of said tract, and sold by John Kiernan and Sarah Kiernan, his wife to Charles Diett as shown by deed recorded in Book 30 page 211, Records of said Multnomah County.

2. A certain parcel of land conveyed by John Kiernan and Sarah Kiernan, his wife to the Portland & Willamette Valley Railway Co., as shown by deeds recorded in Book 99 page 97 Records of Deeds for said Multnomah County, and described as follows, to-wit; Commencing on the South line of half-acre tract conveyed in deed recorded in Book 28, page 499 Records of Deeds for said Multnomah County said point bearing South 75 degrees 30 minutes E 412 feet from the Southwest corner of said halfacre tract; thence Northerly and parallel to and 13 feet from the center line of Railway of second party 32 feet to South line of 10-foot strip described in deed recorded in Book 30, page 211, Records of Deeds for said Multnomah County; thence on South line South 75 degrees 30 minutes E 26 feet; thence Southerly parallel to and 13 feet from the center line of said Railway 32 feet to South line of said half-acre tract; thence on South line North 75 degrees 30 minutes W 26 feet to beginning, containing .02 acres.

TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Ross Island Sand & Gravel Co., and to its successors and assigns forever.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of July A D 1926

Executed in the presence of

Jean McIntosh	J O Elrod	Seal
Jay Bowman	Minerva L Elrod	(Seal)

STATE OF OREGON)
} ss
COUNTY OF MULTNOMAH)

BE IT REMEMBERED That on this 1st day of July A D 1926 before me the undersigned a Notary Public in and for said County and State personally appeared the within named J O Elrod and Minerva L Elrod, husband and wife who are known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF I have hereunto set my hand and Notarial Seal the day and year last above written

Beth S Wolfenden
Notary Public for Oregon

(Notarial Seal)

My Commission expires July 10, 1927

$350.00 US I R S (Cancelled)

Rec for record Aug 23, 1926 at 4:45 P M

[fol. 115K] STATE OF OREGON) ss
COUNTY OF MULTNOMAH)

I, Si Cohn, County Clerk and ex-officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, a Court of Record, do hereby certify that the above copy in DEED BOOK RECORDS is a correct transcript of the original as the same appears of record in my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 8th day of February A.D. 1956.

SI COHN, COUNTY CLERK

By /s/ M. ALLEN

Deputy.

[fol. 115L] EXHIBIT C

(See Opposite)☞

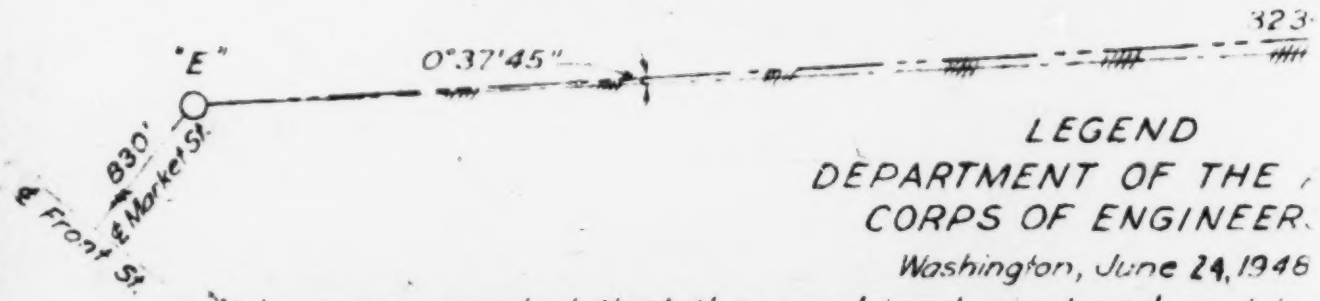
WAR DEPARTMENT

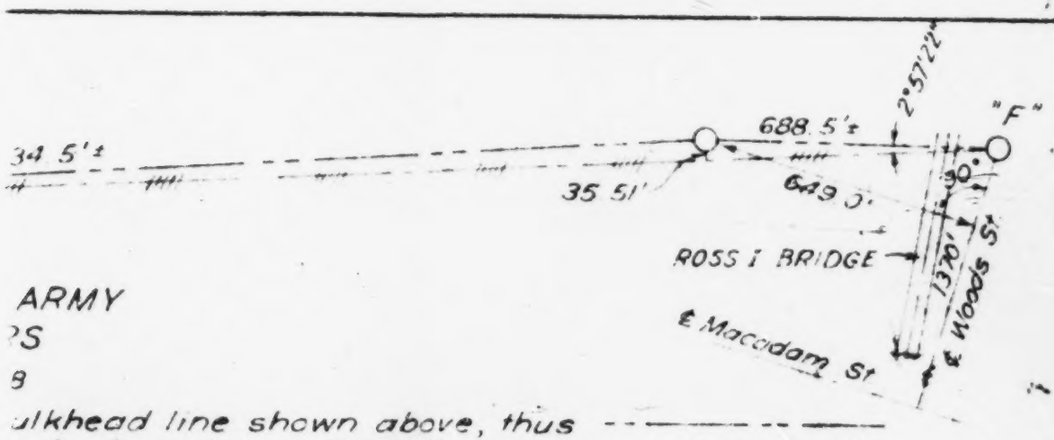
COORDINATES OF U.S.H.L. MONUMENTS AND 2 CITY TRIANGULATION MONUMENTS, HAWTHORNE BRIDGE TO CITY BOUNDARY ON SOUTH. THE ORIGIN OF COORDINATES IS THE INTERSECTION OF FRONT AND MADISON STS

STATION	SOUTH	EAST
H.L. Mon. [illegible] from Thomas St.	6808.76	306.93
H.L. Mon. [illegible] Loc. Co.	11035.34	435.19
H.L. Mon. [illegible]	12938.04	706.41
H.L. Mon. [illegible]	14501.90	930.63
H.L. Mon. [illegible]	16706.10	836.58
H.L. Mon. [illegible]	18034.47	1626.56
City Boundary Post	19198.36	1852.56
H.L. Mon. [illegible]	20455.44	4461.55
H.L. Mon. [illegible]	18951.94	4463.30
H.L. Mon. [illegible]	17911.94	4464.51
H.L. Mon. [illegible]	7283.92	2804.46
H.L. Mon. [illegible]	4422.39	3487.73
City Mon. [illegible]	7347.38	4394.28
City Mon. [illegible]	6661.41	4254.82
H.L. Point A	N.9270.29	W.2140.98
H.L. Point B	N.7965.42	W.485.76
H.L. Point C	N.8934.96	W.2534.55
H.L. Point D	N.2801.38	W.3957.80

U.S.H.L. Monument consists of bronze cap on iron pipe set in concrete except where triangulation station, city street monument or boundary post is used. Triangulation station consists of iron pipe set in concrete, with number of station

DETAIL "E-E" NEAR ROSS ISLAND BRIDGE





ARMY
PS
8

ulkhead line shown above, thus ---------
ede the existing line shown thus ---- ----

LEGEND
WAR DEPARTMENT

Office of the Chief of Engineers
Washington Dec. 27, 1928

It is recommended that the harbor lines shown and described on this map be established by the Secretary of War by his approval thereof, subject to the provisions of Section 11 of the River and Harbor Act approved March 3, 1899, this map to supersede all harbor line maps for these shores previously approved by the Secretary of War.

Edgar Jadwin
Edgar Jadwin
Major General, Chief of Engineers

WAR DEPARTMENT

Washington Dec. 29 1928

Approved

C. B. Robbins
Acting Secretary of War

rhead and bulkhead line defines the limit
ng and the limit to which open pile structures

ST.
ST.
ST.

CORPS OF ENGIN.

Under authority of the Chief of Engineers letter of Nov 5, 1927. E.D-7145(Willamette R)-7, this map in 2 Sheets is made to supersede the original harbor line map approved June 5, 1900, with all modifications & extensions approved up to and including Jan 7, 1927, also modifications tentotively approved Nov. 5, 1927. E.D-7145(Willamette R.)-7 and Mar. 6, 1928, E.D-7145(Willamette R.)-9

LEGEND

WAR DEPARTMENT

Office of the Chief of Engineers
Washington, June 15-1934

It is recommended that the combined pierhead and bulkhead line shown thus ——·——·—— between harbor line point "A" and point "B" be approved to supersede the existing line shown thus ////// - ////// between the same points.

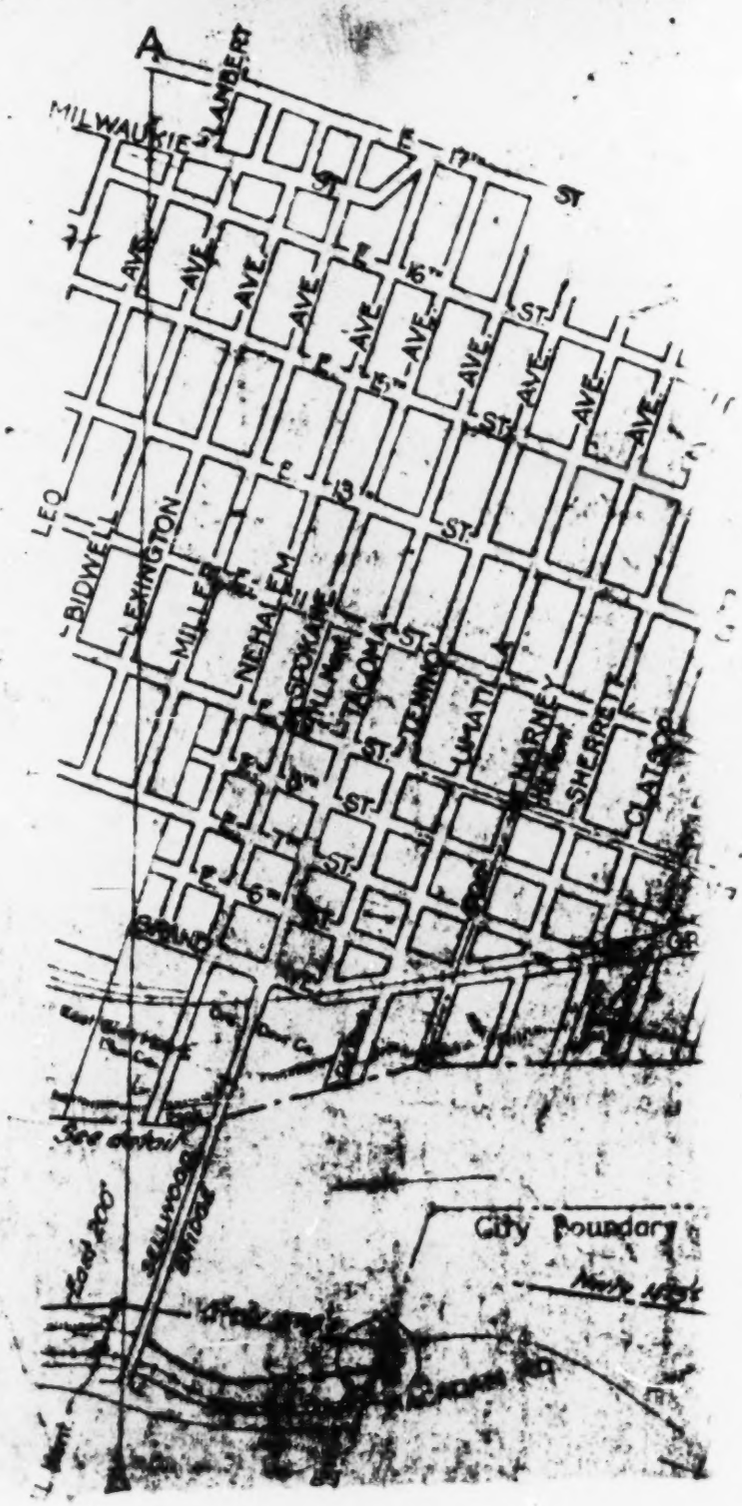
Major General Chief of Engineers

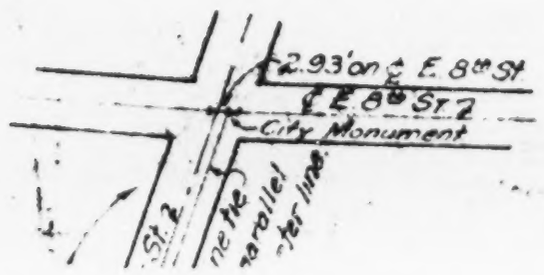
WAR DEPARTMENT

Washington, June 18, 1934.

Approved

Secretary of War





CORPS OF ENGINEERS, U.S. ARMY

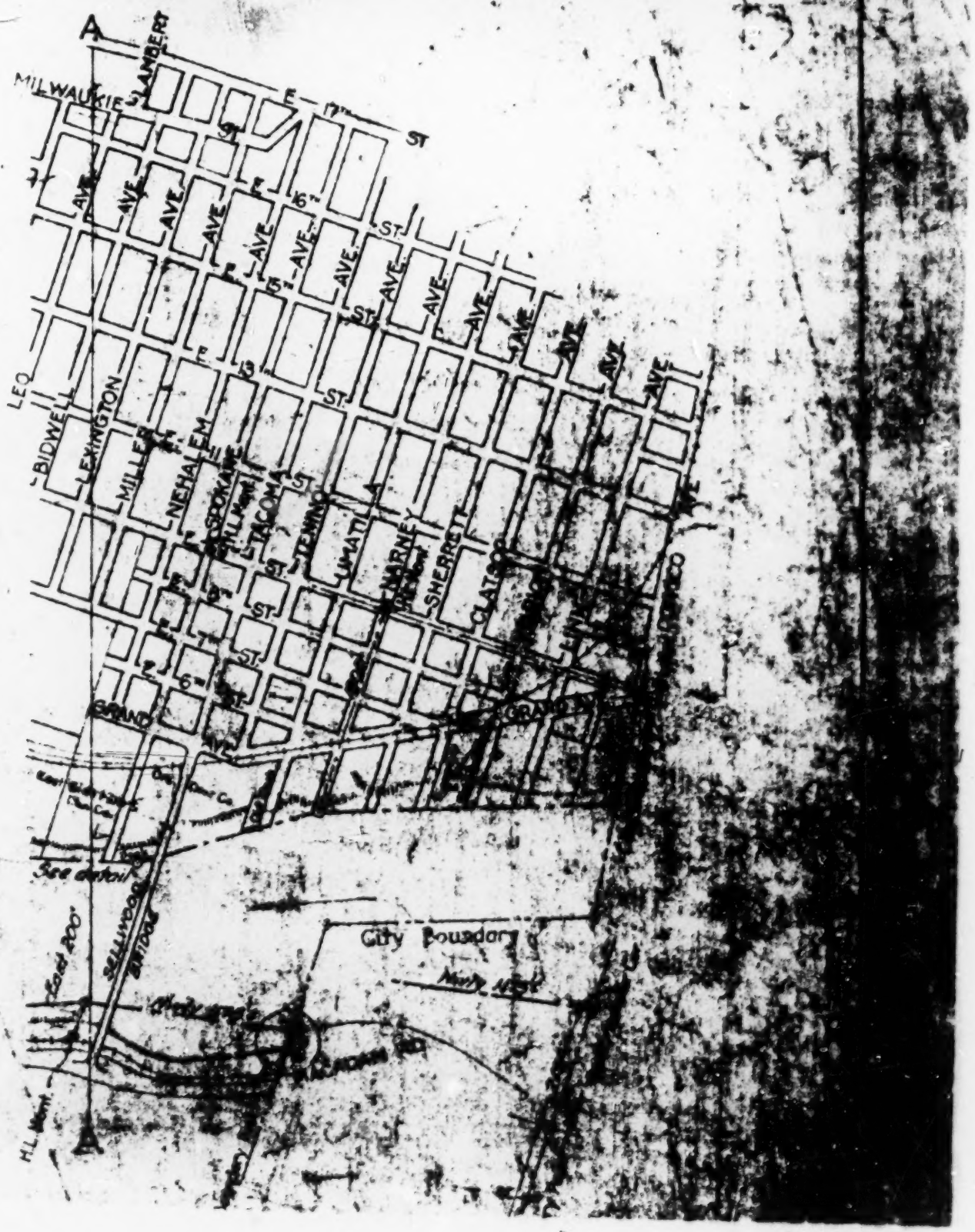
of Engineers letter of Nov 5, 1927.
Sheets is made to supersede the
June 5, 1900, with all modifications
cluding Jan 7, 1927, also modifications
- 7145 (Willamette R.) - J and Mar. 6, 1928.

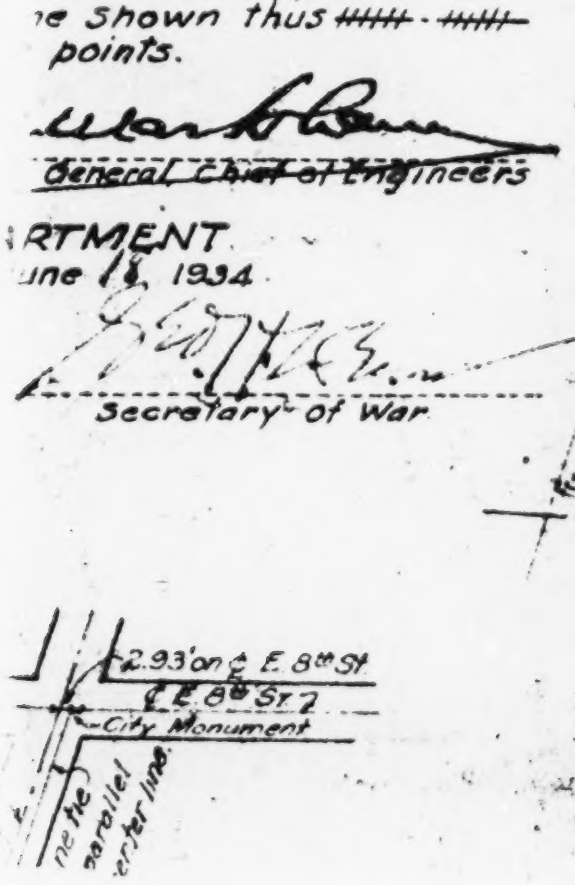
D
RTMENT
f of Engineers
June 15 - 1934
e combined pierhead and
——— between
oint "B" be approved to
e shown thus ##### - #####
points.

General, Chief of Engineers

RTMENT
une 15, 1934

Secretary of War





...nument or boundary post is used. Triangulation
...tion consists of iron pipe set in concrete, with number
...station.

528 S. line Dixon St. produced

NOTE

Combined pierhead of solid filling and ... may be built.

SACRAMENTO
EUGENE
SAN RAFAEL
VANCOUVER
WILLIAMS
VICTORIA
E. BROADWAY
WHEELER
CHERRY
HALSEY
E. CLACKAMAS
WASCO
MULTNOMAH
HASSALO
HOLLADAY
PACIFIC
OREGON
IRVING
E. HOYT
E. GLISAN
FLINT
GANTENBEIN
COMMERCIAL
KERBY
NORTHRUP
MORRIS
STANTON
ALBINA
GRAHAM
KNOTT
RUSSELL
ROSS
PAGE
DELAY
LARRABEE
THOMPSON
TILLAMOOK
KERBY
ROSS
DIXON
BENTON
HANCOCK
BROADWAY
CROSBY
MARGIN
ALAMEDA
OCCIDENT
WILLAMETTE
RAILROAD
UNION
FRONT
BROADWAY BRIDGE
RAILROAD
HARRISON
RANDOLPH
LEWIS
HARDING
LOVEJOY
SMITH
RIVER
BOONE
See detail above
See detail below
between arrows ... ties for points 58, Dock
given in detail
Irving Dock A
Lumber Terminal
Municipal Paving Plant "A"
Admiral Terminal
Pacific Coast Coal Co.
Crown Mills
Columbia Dock
Jersey Dock
H.L.Main
Railroad Yards
Railroad Tracks
UNION DEPOT
N.P. Freight Shed
P. Freight Shed
PARK
B.P.R.R. Freight Sheds
Globe
Gifford
Terminal No. 1
Terminal No. 2
Terminal No. 3
Terminal No. 4
Terminal No. 5
Terminal No. 6
Terminal No. 7
Terminal No. 8
Terminal No. 9
Terminal No. 10
Terminal No. 11
Terminal No. 12
Terminal No. 13
Terminal No. 14
Terminal No. 15
Terminal No. 16
Terminal No. 17
Terminal No. 18
Terminal No. 19
Terminal No. 20
Terminal No. 21
Terminal No. 22
Terminal No. 23
Terminal No. 24
Terminal No. 25
Terminal No. 26
Terminal No. 27
Terminal No. 28
Terminal No. 29
Terminal No. 30
Terminal No. 31
Terminal No. 32
Terminal No. 33
Terminal No. 34
Terminal No. 35
Terminal No. 36
Terminal No. 37
Terminal No. 38
Terminal No. 39
Terminal No. 40
Terminal No. 41
Terminal No. 42
Terminal No. 43
Terminal No. 44
Terminal No. 45
Terminal No. 46
Terminal No. 47
Terminal No. 48
Terminal No. 49
Terminal No. 50
Terminal No. 51
Terminal No. 52
Terminal No. 53
Terminal No. 54
Terminal No. 55
Terminal No. 56
Terminal No. 57
Terminal No. 58
Terminal No. 59
Terminal No. 60
Terminal No. 61
Terminal No. 62
Terminal No. 63
Terminal No. 64
Terminal No. 65
Terminal No. 66
Terminal No. 67
Terminal No. 68
Terminal No. 69
Terminal No. 70
Terminal No. 71
Terminal No. 72
Terminal No. 73
Terminal No. 74
Terminal No. 75
Terminal No. 76
Terminal No. 77
Terminal No. 78
Terminal No. 79
Terminal No. 80
Terminal No. 81
Terminal No. 82
Terminal No. 83
Terminal No. 84
Terminal No. 85
Terminal No. 86
Terminal No. 87
Terminal No. 88
Terminal No. 89
Terminal No. 90
Terminal No. 91
Terminal No. 92
Terminal No. 93
Terminal No. 94
Terminal No. 95
Terminal No. 96
Terminal No. 97
Terminal No. 98
Terminal No. 99
Terminal No. 100

LEGEND

City Street Monument.

Harbor Line (Combined pierhead & bulkhead line)

Notes:-

For the purpose of defining the harbor lines, the bearing of the ℄ of Macadam St. between Gibbs & Thomas Streets is taken as S1°28'40"W. the north line of Canby St. as S. 89°26'36"E. and the ℄ of East 8th St. north of Center St. as N.11°29'30"W.

Triangulation north of Railroad Bridge is based on U.S Coast & Geodetic Survey Stations Scott-Caples, bearing 341°39'32", log distance 3.9960093

Triangulation in vicinity of Ross Island (Sheet No1) is not connected with that north of Railroad Bridge except through City Street Surveys.

Where ties to harbor line points are not given, see enlarged details.

Soundings are in feet and show the depth at low water.

WILLAMETTE

See Detail Above

See detail below

Combined pierhead & b

SOUTHERN PACIFIC RY

P.E.P. Co Yards

Thirty Foot Channel

Supplee Dock

Columbia Co

Hawthorne Dock

Taggart Dock

Dock

Log Loading Place

Grand Mill Dock

Morrison Bridge

Hawthorne Bridge

Ross Island Bridge

Burnside Bridge

Front

Water

Grand Ave

Union Ave

Davis

Couch

Everett

Flanders

Burnside St

Lankeny

Pine

Ankeny

Stark

Washington

Alder

Morrison

Yamhill

Taylor

Salmon

Main

Madison

Hawthorne

Clay

Market

Mill

Stephens

Harrison

Lincoln

Grant

Sherman

Caruthers

Division

Clinton

Woodward

Brooklyn

Holly

Beacon

Park

Broadway

Yamhill

Taylor

Jefferson

Columbia

Water

Front

Harbor

Lake

Ladd

Bridge

Hill

Dock

Log Pond

Ferry

Boom

Pier

Ferry Slip

Log Pond

Log Loading Place

Sawmill Dock

Tacoma Dock

Columbia Co Dock

Supplee Dock

Thirty Foot Channel

oved

Secretary of War

S. 150'

2.93' on ℄ E. 8th St.

℄ E. 8th St. ?

City Monument

℄ Center St.?

Harbor line the may not parallel street center line

See detail

Wood Bridge

City Boundary

Mark West

H.L. Mark

MS. LAUGHLIN ST

LAFAYETTE ST

RHONE

BUSH

CENTER

BOISE

CORA

MALL

REYNOLDS

HOLGATE

CROOKHAM

SCHILLER

MITCHELL ST

INSLEY

HAROLD

CAIN

CRAMPTON

LAVERN ST

MILWAUKIE

E. 10th

E. 13th

E. 14th

E. 15th

E. 16th

E. 17th

AVE

ST

N 22° W 500'

N 5° E 1000'

N 20° 15' W 530'

N 3° E 800'

N 54° W 1200'

N 54° W 1700'

N 19° 25' 36" W 704.57

N 34° 45' W 587'

N 45° 15' W 630'

N 30° 30' E 2700'

N 22° E 2600'

N 39° E 980'

N 55° E

30' W 2794'

Pacific Inland Sand & Gravel Co

Landing Terminal

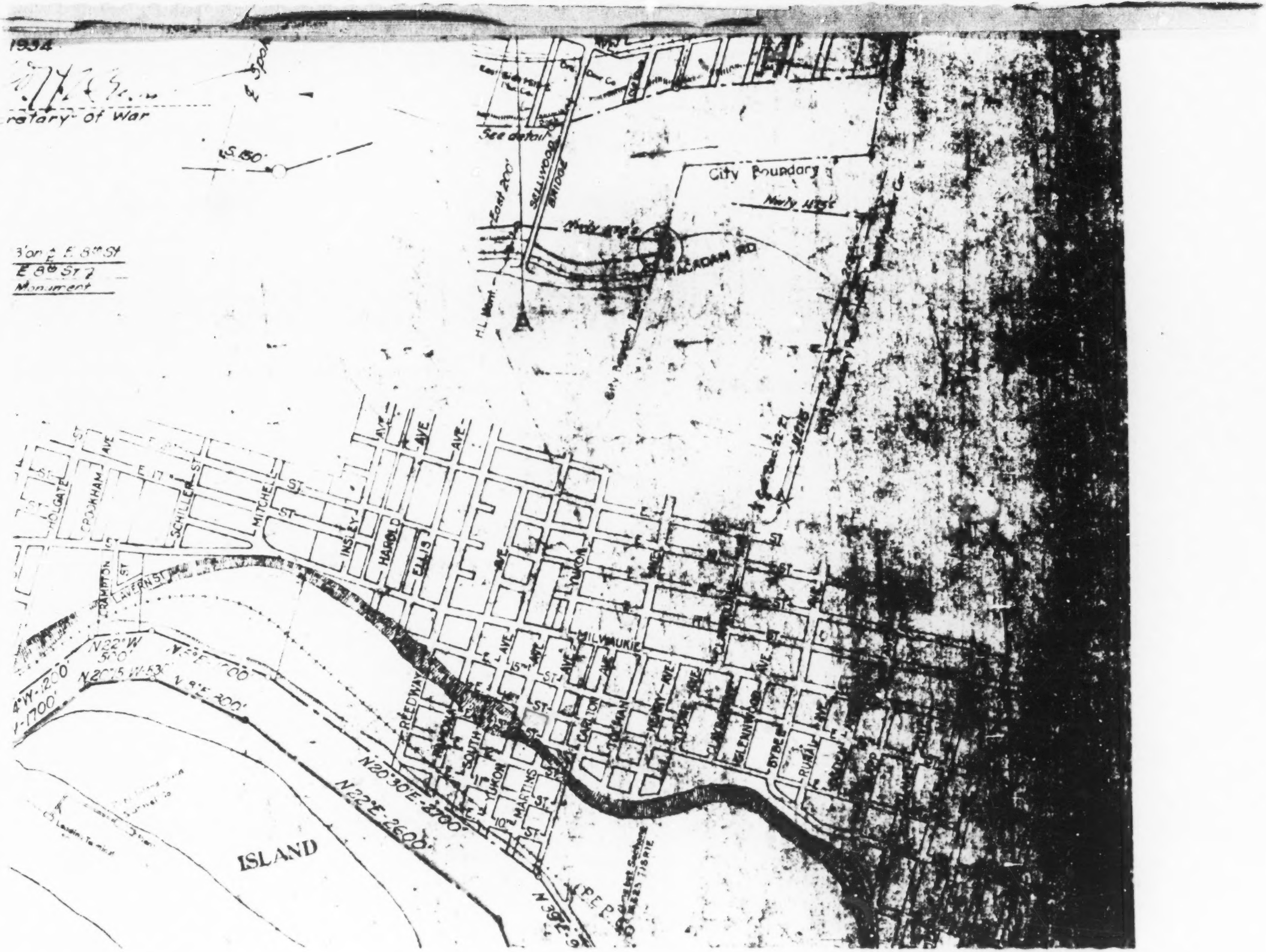
Plant

ISLAND

ROSS

S 13° 1930' from ℄ Macadam St

S 108'


1934
Secretary of War
E Spook
See detail
City Boundary
Holy Angel
Holy Angel
Sellwood Bridge
Ford 200'
Ramp
Ramp
Ramp

Oklahoma Ford

City [illegible] Post	20455.44	4461.55
H.L.M. or City Boat @ E 9th St.	18951.94	4463.30
H.L.M. @ Memorial Bridge	17911.94	4464.51
H.L.M. @ Spokane St. @ E 99th St.		

See detail below

Municipal Paving Plant

Union Pacific Railroad

Great Mills

Pacific Coast Co

Admiral Terminal

Terminal No 1

Western Lumber Co

Lumber

NORTH FRONT

HLM

AVE

ST

BROADWAY

DAVIS

COUCH

EVERETT

QUIMBY

MARSHALL

KEARNEY

JOHNSON

IRVING

LANDER

BLACKSTONE

FAIRBANKS

GUILD

YORK

SCOSTEL

WILSON

VAUGHN

UPSHUR

THURMAN

SAWTER

RALEIGH

INDUSTRIAL AVE

WARDWAY

FRONT ST

East line of Broadway produced after widening in 1912.

East line of Broadway produced before widening in 1912.

992.6
1240.8

Edgar Jadwin

Edgar Jadwin

WILLAMETTE

See Detail Above

See Detail Below

"E"

"F"

MAIN THORNS. 90°

432.5 to Front St

WATER

FRONT

PARK

WASHINGTON

STARK

ALDER

BROADWAY

MORRISON

YAMHILL

TAYLOR

SALMON

MAIN

MADISON

JEFFERSON

COLUMBIA

CLAY

MARKET

MILL

MONTGOMERY

HARRISON

COLLEGE

JACKSON ST

LINCOLN

GRANT

SHERMAN

CARUTHERS

SHERIDAN

ARTHUR

MEADE

HOOKER

PORTER

WOODS

GRover

GIBBS

WHITAKER

CURRY

PENNOYER

GAINES

LANE

TERWILLIGER

MOODY

HOOD

MACADAM

KELLY

CORBETT

ABERNETHY

ASH

PINE

OAK

VINE

ANKENY

BURNSIDE

COUCH

E WOODS ST

L G Sperry Co

Dollar Portland Lbr Co

Dock

Pile

Ferry Slip

Ferry Landing

Public Landing

Steps

Boat House

Ice House

Smith & Watson

Bade & Sons

Johnson & Wood

Shipbuilding Ways

Railroad

Tracks

Roadway

Paved

Sidewalk

Curb

Gutter

Fence

Bridge

Ramp

Stairs

Pole

Hydrant

Manhole

Catch Basin

Sewer

Water

Gas

Telephone

Electric

Conduit

Trolley

Overhead Wires

Building

Brick

Frame

Concrete

Stone

Iron

Wood

Shed

Tank

Tower

Chimney

Flagpole

Sign

Clock

Bench

Mail Box

Fire Alarm

Telephone Booth

Parking Meter

Traffic Light

Traffic Signal

Crosswalk

Intersection

Property Line

Lot Line

Block

Lot

Number

Name

Address

Elevation

Contour

Grade

Slope

Retaining Wall

Embankment

Cut

Fill

Drainage

Culvert

Pipe

Manhole

Catch Basin

Inlet

Outlet

Flow

Direction

Distance

Bearing

Angle

Curve

Tangent

Radius

Chord

Arc

Point

Line

Survey

Monument

Benchmark

Control Point

Traverse

Triangulation

Station

Offset

Baseline

Meridian

Township

Range

Section

Quarter

Corner

Boundary

Easement

Right of Way

Dedication

Vacation

Annexation

Zoning

Use

Density

Setback

Height

Area

Perimeter

Scale

North

Grid

Coordinate

Datum

Projection

Legend

Title

Date

Author

Source

Notes

Revision

Approval

Seal

Signature

Witness

Notary

Acknowledgment

Deed

Mortgage

Lien

Tax

Assessment

Value

Improvement

Land

Total

Exempt

Taxable

Rate

Levy

Collection

Delinquent

Penalty

Interest

Abatement

Refund

Appeal

Hearing

Board

Commission

Council

Ordinance

Resolution

Motion

Vote

Yea

Nay

Abstain

Absent

Quorum

Majority

Minority

Unanimous

Tie

Veto

Override

Effective

Repeal

Amend

Supersede

Codify

Publish

Post

Notice

Hearing

Public

Comment

Testimony

Exhibit

Record

Transcript

Minutes

Agenda

Calendar

Schedule

Deadline

Extension

Continuance

Postponement

Cancellation

Rescheduling

Adjournment

Recess

Session

Meeting

Workshop

Conference

Seminar

Training

Orientation

Briefing

Report

Memorandum

Letter

Email

Phone

Fax

Mail

Delivery

Pickup

Courier

Messenger

Express

Priority

Urgent

Confidential

Personal

Private

Public

Open

Closed

Sealed

Unsealed

Filed

Docketed

Assigned

Reassigned

Transferred

Referred

Forwarded

Returned

Rejected

Accepted

Approved

Denied

Pending

Withdrawn

Dismissed

Settled

Compromised

Litigated

Arbitrated

Mediated

Negotiated

Drafted

Reviewed

Revised

Finalized

Executed

Recorded

Filed

Archived

Destroyed

Shredded

Deleted

Backed Up

Restored

Migrated

Converted

Scanned

Indexed

Searched

Retrieved

Copied

Printed

Faxed

Emailed

Mailed

Delivered

Picked Up

Signed

Witnessed

Notarized

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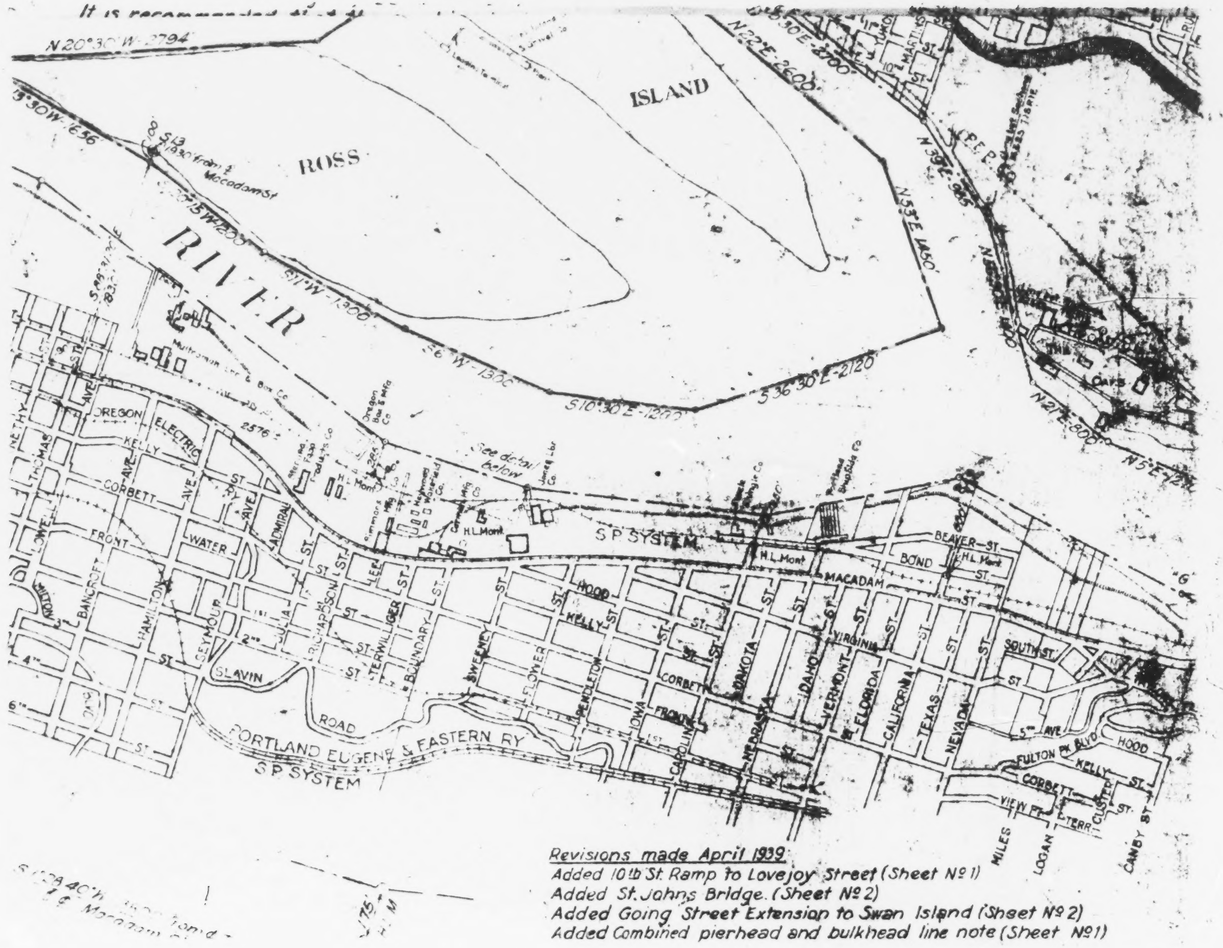
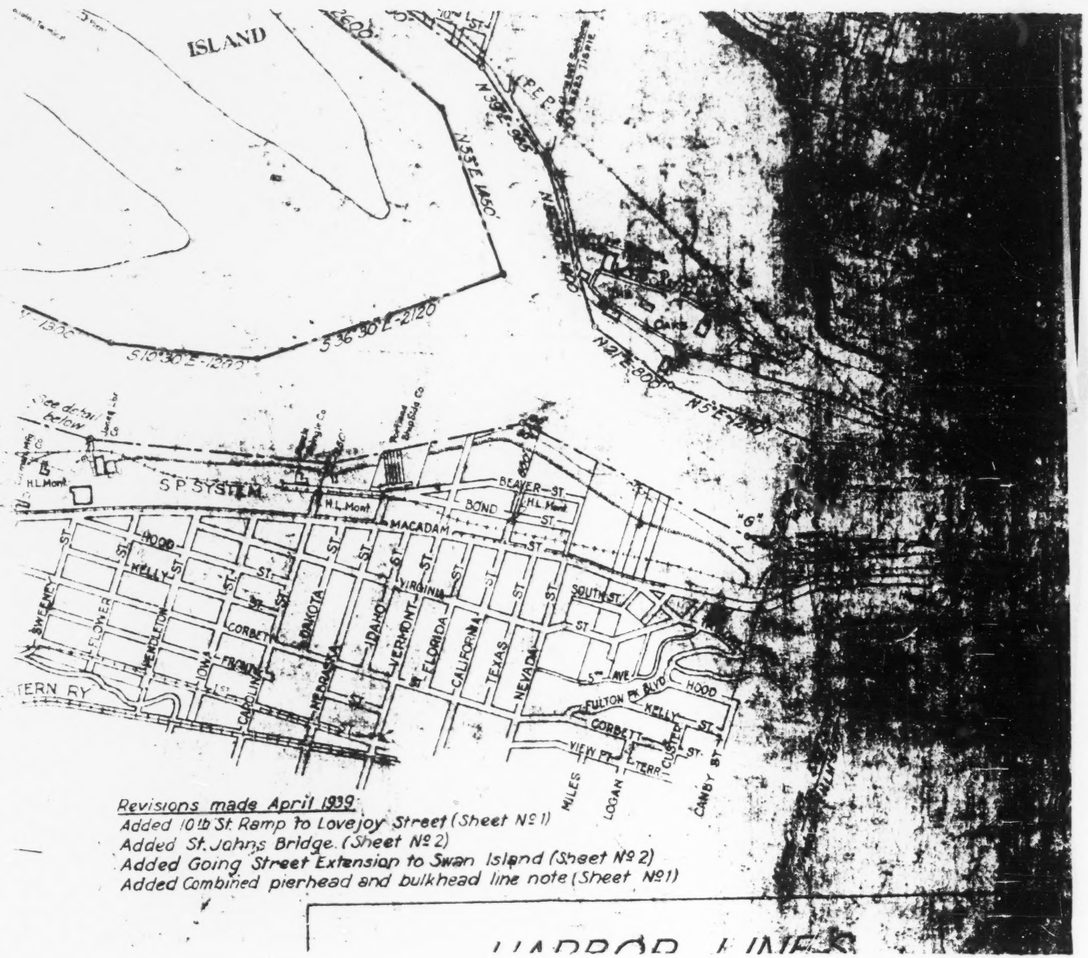


Revisions made April 1939
Added 10th St. Ramp to Lovejoy Street (Sheet No 1)
Added St. Johns Bridge. (Sheet No 2)
Added Going Street Extension to Swan Island (Sheet No 2)
Added Combined pierhead and bulkhead line note (Sheet No 1)



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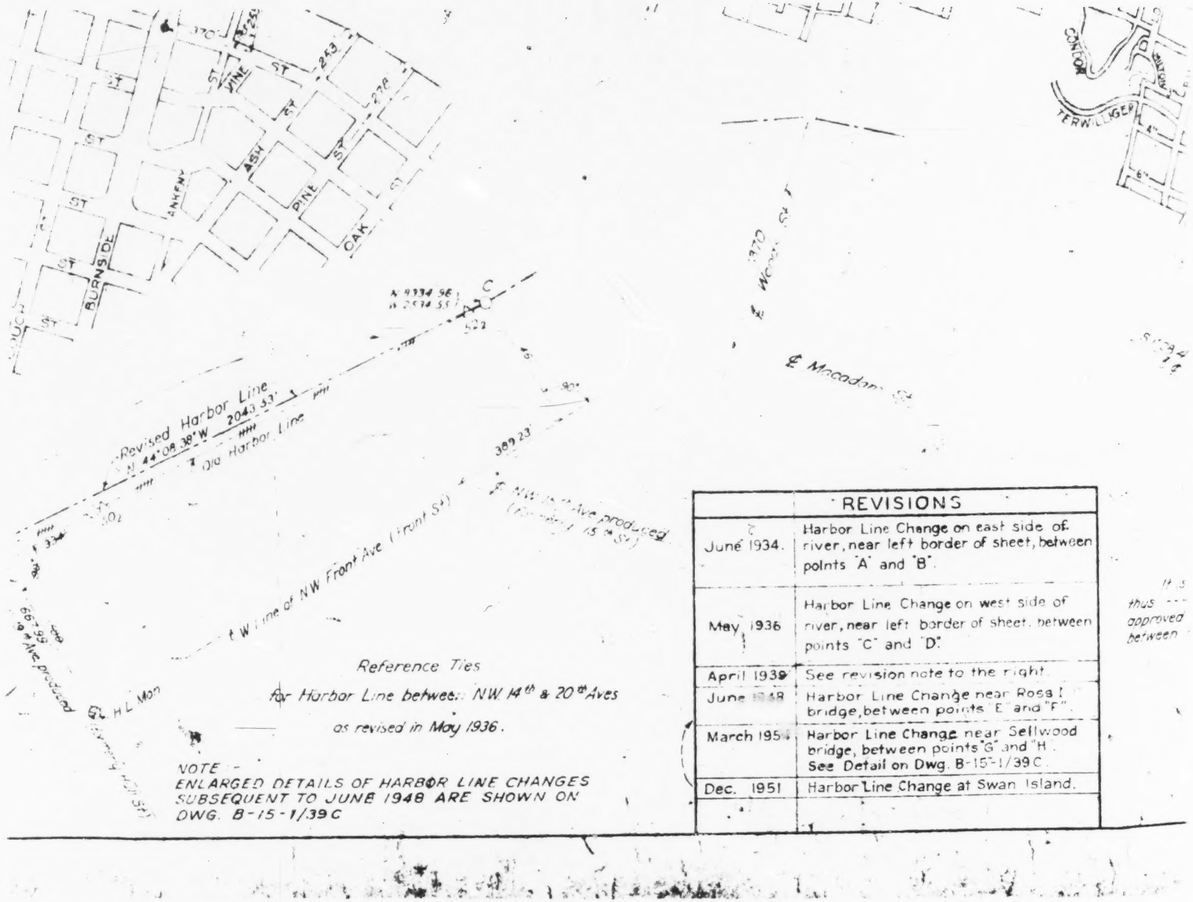
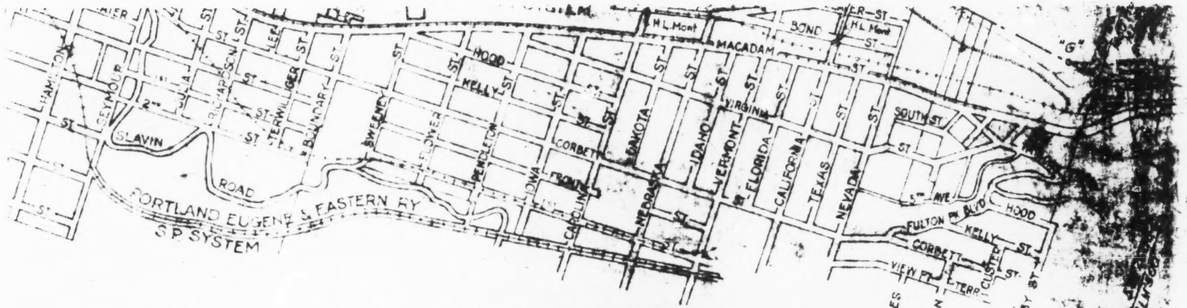


	REVISIONS
June 1934.	Harbor Line Change on east side of river, near left border of sheet, between points "A" and "B".
May 1936	Harbor Line Change on west side of river, near left border of sheet, between points "C" and "D".
April 1939	See revision note to the right.
June 1948	Harbor Line Change near Ross Island bridge, between points "E" and "F".
March 1954	Harbor Line Change near Sellwood bridge, between points "G" and "H". See Detail on Dwg. B-15-1/39C.
Dec. 1951	Harbor Line Change at Swan Island.



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Added Going Street Extension to Swan Island (Sheet No 2)
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LEGEND
WAR DEPARTMENT
Office of the Chief of Engineers
Washington, June 2, 1936.

mmended that the combined pierhead and bulkhead line shown
– – – – – – – – between harbor line points C and D be
supersede the existing line shown thus - ### - ### - ###
ame points.

Major General, Chief of Engineers.

WAR DEPARTMENT
Washington, June , 1936

pproved:

Secretary of War.

HARBOR LINES
WILLAMETTE RIVER
AT PORTLAND OREGON

IN 2 SHEETS

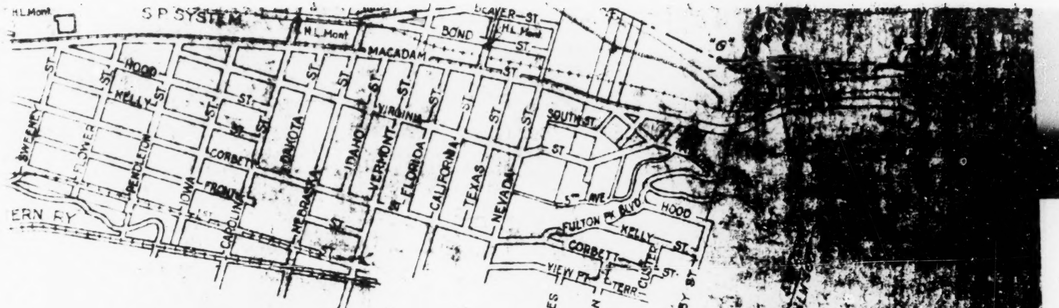
Scale of Feet
500' 0 500' 1000' 1500'

U.S. ENGINEER OFFICE, PORTLAND OREGON

Submitted
R.E. Hickson
Engineer

Drawn by S.E.M. & W.B.P.
Traced by W.B.P.

BWP5-G+-39"A"



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WILLAMETTE RIVER
AT PORTLAND OREGON

IN 2 SHEETS

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500' 0 500' 1000' 1500'

U.S. ENGINEER OFFICE, PORTLAND OREGON

Submitted
R.E. Hickson
Engineer

Drawn by S.E.M. & W.B.P.
Traced by W.B.P.

BWP5-G+-39"A"

[fol. 115M] EXHIBIT D

(See Opposite)☞

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IN CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

CERTIFICATE OF TRIAL JUDGE—April 16, 1956

The foregoing Bill of Exceptions was presented and tendered to the Court by the plaintiff on the 13th day of April, 1956.

The Court hereby certifies that said Bill of Exceptions contains a full and correct record of said exceptions; all of the testimony introduced by the respective parties at the trial of the above cause; the exhibits offered and received or rejected, except that the transcript of proceedings made a part of the Bill of Exceptions by reference does not indicate that defendant's Exhibit 1 and plaintiff's Exhibits A, B, C and D were received in evidence, whereas in fact said exhibits, and each and every one of them, were received in evidence without objection; all stipulations of the parties by their respective counsel, and while the transcript of proceedings does not expressly so indicate, the stipulations dictated into the record by Mr. Buttler and appearing on pages 7, 96 and 97 of said transcript, counsel for each of the respective parties stipulated to all of said statements; all motions and objections made by counsel and the rulings of the Court thereon; the exceptions taken and allowed by the Court, except that the Bill of Exceptions does not include any instructions given by the Court to the Jury or any instructions requested by either of the parties to be given by the Court to the Jury, there having been no exceptions taken by either of the parties to any of the instructions given by the Court or to the failure of the Court to give any of the instructions requested by either of the parties or to the modification by the Court of any of the instructions requested by either of the parties; the verdict of the Jury in favor of the plaintiff; the Judgment entered on said verdict for the plaintiff; the plaintiff's Cost Bill duly served, filed and allowed; defendant's motions for judgment for defendant notwithstanding the verdict for plaintiff, served and filed by defendant, and the judgment order allowing defendant's

motion for judgment for defendant notwithstanding the verdict and entering judgment for defendant.

The foregoing Bill of Exceptions is, therefore, hereby settled, approved and allowed this 16th day of April, 1956.

James R. Bain, Judge.

[fol. 117] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

HARRY A. HAHN, Appellant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

Appeal from Circuit Court, Multnomah County.

James R. Bain, Judge.

Argued and submitted November 20, 1957.

Dwight L. Schwab argued the cause for Appellant. On the briefs were Hutchinson, Schwab & Burdick and John H. Buttler, Portland.

Arno H. Denecke argued the cause for Respondent. On the brief were Mautz, Souther, Spaulding, Denecke & Kinsey, Portland.

LUSK, J.

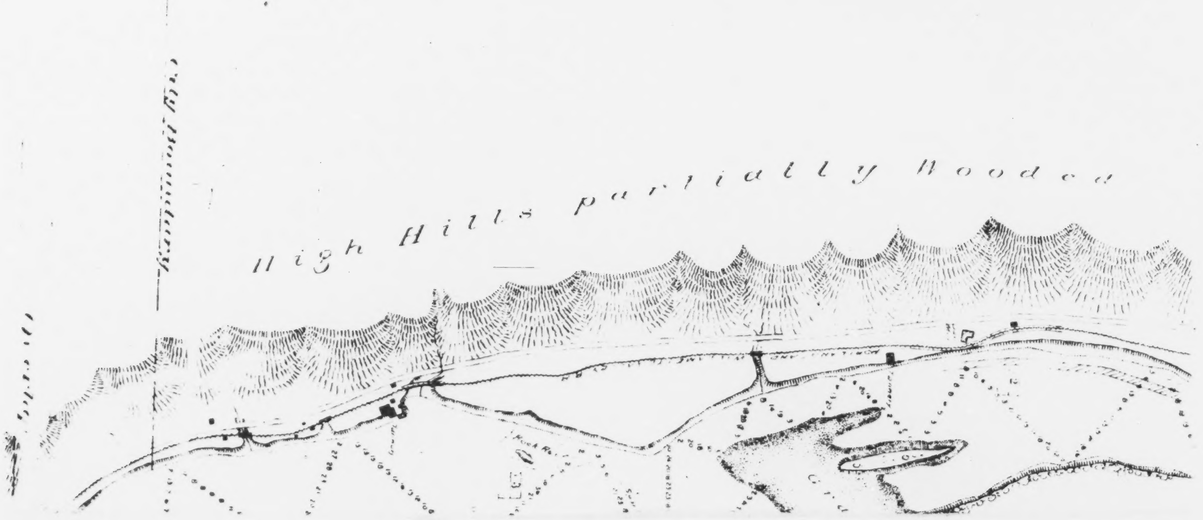
Affirmed.

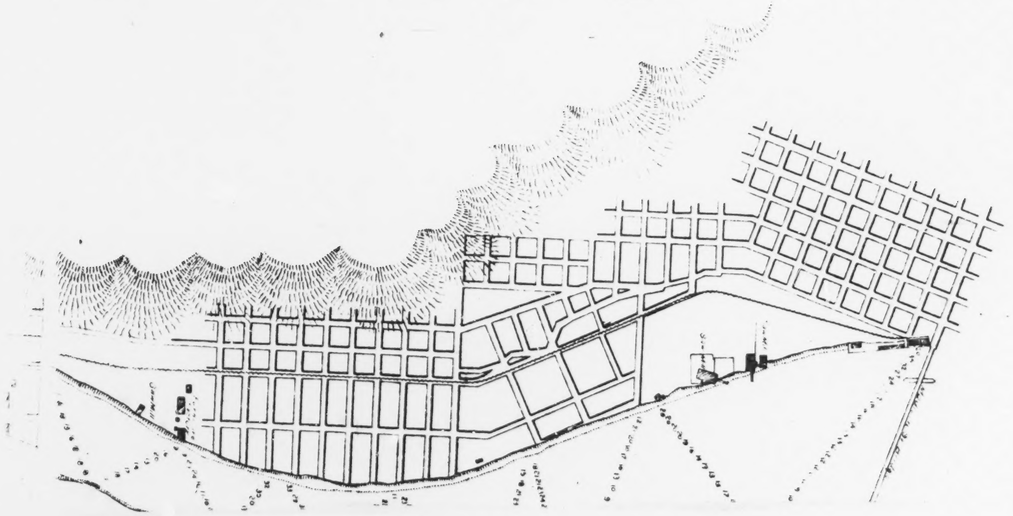
[fol. 118] OPINION—Filed January 22, 1958

LUSK, J:

This is a personal injury action under the Oregon Employers' Liability Act in which the court set aside a verdict

CITY OF PORTLAND





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for the plaintiff and entered judgment for the defendant notwithstanding the verdict. The plaintiff has appealed. The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§901 et seq.). This ruling presents the only question on this appeal.

The defendant is an Oregon corporation which operates a sand and gravel business on the Willamette River in Portland. It conducts dredging operations with the use of a dredge, barges and power-driven machinery in a portion of the river referred to in the testimony as a lagoon—a small bay or inlet roughly rectangular in shape, the entrance to which from the main body of the river is at the north. Otherwise, it is surrounded by land—Ross Island on the west, Hard Tack Island on the east, and a strip of land on the south connecting the two.

On the day that plaintiff was injured, March 23, 1955, and for some eight days prior thereto, he was employed by the defendant as an "oiler." His general duties were on a dredge anchored to the shore, which was used to scoop out sand and gravel from the bottom of the lagoon and dump it on a barge. He looked after the machinery of the dredge and operated a winch to move the barge into position. If there was a breakdown in the machinery it was his duty to repair it. The barge, when filled, was moved to the crusher, which was located inside of the lagoon, and, after the gravel was crushed, it was carried by means of a conveyor belt to the defendant's plant on the right bank of the river. He was injured, however, while performing a dif- [fol. 119] ferent type of work. He was ordered to assist in transferring a large gravel bin or hopper, used for loading sand and gravel into trucks, from one barge to another. The hopper was so constructed that trucks could be driven under it to receive their loads. A power-driven crane on shore was employed to pick up the hopper and move it. After the hopper was moved and stowed it became the plaintiff's job to go to the top of the hopper by means of a ladder nailed to the hopper and loosen a cable used in the moving operation. He had climbed high enough to reach the top rung of the ladder with his hand when the ladder

gave way, and he fell a distance of about eight or ten feet, landing on his back on hard-packed sand in the barge and receiving serious injuries. The ladder fell upon him. The evidence shows that the ladder, which was constructed of heavy timbers, was fastened to the hopper only by nails which had been driven into wood that was rotten. No bolts or chains were used to make it secure, although it was practicable to use them. There seems to be no question about the negligence of the defendant or its violation of the provisions of the Employers' Liability Act.

In 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act in order to provide compensation irrespective of fault for injury or death in the case of employees of employers "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." USC, Title 33, §902 (4). Section 903 (a) provides in part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the [fol. 120] United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Liability of an employer as prescribed by the Act is made exclusive, but, if any employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, is given an election to claim compensation or to maintain an action at law or in admiralty for damages, in which case the defenses of negligence of a fellow servant, assumption of risk, and contributory negligence are not available to the employer. §905.

The defendant had secured payment of compensation as required by the federal Act, §932, but had exercised its election not to be subject to the Workman's Compensation Law of this state (ORS 656.022).

It is contended first, on the part of the plaintiff, that the injury did not occur upon "navigable waters of the United States," but as to this we think that there can be little doubt. The body of water upon which the injury occurred is a portion of the Willamette River, which is concededly a navigable stream. Willamette Iron Bridge Co. v. Hatch, 125 US 1, 8 S Ct 811, 31 L ed 629; Port of Portland v. Reeder, 203 Or 369, 280 P2d 324. Tugs, the largest of which has a draft of nine feet, ply in and out of the lagoon. The hopper upon which plaintiff met with his injury was towed in a barge by tug owned and operated by the defendant to the lagoon from Sun Dial Beach on the Sandy River, a tributary of the Columbia River, and afterwards was taken by the same means to Cathlamet on the Columbia River in the state of Washington. The tug referred to was 50 feet long. It was used to tow sand and gravel "from one job to another," going at times to Ilwaco, Washington, about three miles from the mouth of the Columbia River and up the Columbia as far as the Bridge of the Gods.

The test for determining what are navigable waters of the United States was thus stated by Mr. Justice Field in The Daniel Ball, 77 US 557, 563, 19 L ed 999:

> [fol. 121] " * * * The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navi-

gable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

See, also, Crowell v. Benson, 285 US 22, 55, 52 S Ct 285, 76 L ed 598; Dailey v. City of New York, 128 Fed 796 (SD NY 1904); I Benedict on Admiralty (6th ed) 94-96.

The evidence discloses that the body of water in question fully meets this test. It is navigable in fact and therefore in law, and forms "by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." The fact that the defendant owns the land partially surrounding the lagoon does not militate against this conclusion. United [fol. 122] States v. Chicago, M & St. P. & P. R. Co., 312 US 592, 596-597, 61 St Ct 772, 85 L ed 1064. The government has drawn harbor lines around the land, but whether water is inside or outside harbor lines is not a test of navigability. See Port of Portland v. Reeder, supra. People v. The Commissioners of Land Office, 202 App Div 240, 196 NYS 115, cited by the plaintiff, is not in point. Other facts to which plaintiff calls attention, such as that the defendant has no permit from any governmental authority to dredge sand in the lagoon; that it has enlarged the area of the lagoon and diminished that of the land; that it charges owners of log rafts for the privilege of parking them in the lagoon; and has erected therein piling and structures which may constitute obstructions to navigation, we believe to be irrelevant.

We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling.

Ten years before the Longshoremen's and Harbor Workers' Act was passed the Supreme Court reversed a judgment of the New York Court of Appeals which sustained an award of compensation under the New York Compensation Law to the widow and children of one Jensen, who was accidentally killed while working as a stevedore unloading cargo from a vessel berthed in the North River, navigable waters of the United States. Southern Pacific Co. v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086, LRS 1918C 451, Ann Cas 1917E 900 (1917). The reasoning of the court was as follows: Article III, §2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Article I, §8, con- [fol. 123] fers upon Congress the power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Pursuant to this provision Congress enacted the Judiciary Act of 1789, which gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Congress has the power to fix and determine maritime law throughout the country, and, in the absence of a controlling statute, general maritime law, as accepted by the federal courts, is applicable to matters within the maritime and admiralty jurisdiction. The work in which Jensen was engaged, his contract of employment, and his injuries were all maritime, and the rights and remedies of the parties were within the maritime jurisdiction. Further, since the remedy of the Compensation Act was wholly unknown to the common law, it was not saved to suitors from the grant of exclusive jurisdiction in the Judiciary Act. It was therefore concluded that the New York statute, as attempted to be applied, "works material prejudice to the characteristic

features of the general maritime law [and] interferes with the proper harmony and uniformity of that law in its international and interstate relations."

This was a five to four decision, Justices Holmes and Pitney wrote dissenting opinions, both of which were concurred in by Justices Brandeis and Clarke. There has been [fol. 124] considerable dissatisfaction with it both among commentators and in the Supreme Court itself, but it has never been overruled, and it was cited as recently as 1953 as controlling authority. Pennsylvania Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367.

Following the Jensen case Congress twice amended the Judiciary Act in endeavors to secure to maritime workers the benefits of state compensation laws.[1] Both amendments were held unconstitutional on the authority of the Jensen case. Knickerbocker Ice Co. v. Stewart, 253 US 149, 40 S Ct 438, 64 L ed 834, 11 ALR 1145 (1919); Washington v. W. C. Dawson & Co., 264 US 219, 44 S Ct 302, 68 L ed 646 (1924).

Against this background, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act. A great deal of litigation followed in which the question involved was whether, under the circumstances of the particular case, application of a state compensation law interfered "with the proper harmony and uniformity of" maritime law, the test laid down in the Jensen case. This history is reviewed in Davis v. Department of Labor, 317 US 249, 63 S Ct 225, 87 L ed 246. See, also, Nogueira v. N.Y., N.H. & H.R. Co., 281 US 128, 50 S Ct 303, 74 L ed 754; 2 Larson, Workmen's Compensation Law, pp 409-413; Gilmore and Black, The Law of Admiralty, pp 344-348. If the workman was injured in an employment considered to be "maritime but local," that is, only indirectly connected with [fol. 125] navigation and commerce, recovery under a state

[1] The Act of October 6, 1917, added to the savings clause of the Judiciary Act of 1789 the following: "and to claimants the rights and remedies under the workmen's compensation law of any State." The Act of June 10, 1922, amended this new matter so as to read "and to claimants for compensation for injuries to or death of persons *other than the master or member of the crew of a vessel* their rights and remedies under the workmen's compensation law of any State," etc. (Italics added.)

compensation law was permissible. The rule was thus summarized in Sultan Railway & Timber Co. v. Department of Labor and Industries, 277 US 135, 137, 48 S Ct 505, 72 L ed 820 (1928)

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. Grant Smith-Porter Co. v. Rohde, 257 U.S. 469; Millers' Indemnity Underwriters v. Braud, 270 U.S. 59; Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467."

Otherwise, the federal Act afforded the exclusive remedy, as provided in USC §903. In many instances the problem of where to draw the line was extremely difficult, and fine distinctions were indulged so that it became well-nigh impossible in some instances to predict on which side of the line a particular case would fall. Two of the decisions of this court during this period are illustrative. In Mark v. Portland Gravel Co., 130 Or 11, 278 P 986 (1929), the plaintiff was injured while working as engineer upon a dredge in the Columbia River, scooping up sand from the bed of the river and loading it on barges alongside for purposes of sale. The "local concern" doctrine was applied, and the plaintiff's remedy held to be exclusively under the State Compensation Law. The court relied on Grant Smith-Porter Ship Co. v. Rohde, 257 US 469, 42 S Ct 157, 66 L ed 321, 25 ALR 1008 (1922), in which the Supreme Court of the United States held that an injury sustained by the plaintiff while working as a carpenter on an uncompleted vessel on the Willamette [fol. 126] River was compensable under the Oregon Compensation Law. In Martinson v. State Ind. Acc. Com., 154 Or 423, 60 P2d 972 (1936), the workman was, at the time of his injury, assisting in the loading of machinery on a barge moored to a wharf on the Willamette River at Por-

land. The barge, when loaded, was to be towed to Bonneville Dam on the Columbia River. This court held that the work in which the plaintiff was engaged was maritime in nature, under the rule that loading or unloading a vessel is not a matter of purely local concern (Northern Coal & Dock Co. v. Strand, 278 US 142, 49 S Ct 88, 73 L ed 232; Employers' Liability Assurance Corp. v. Cook, 281 US 233, 50 S Ct 308, 74 L ed 823), and that there could be no recovery under the State Compensation Law.

In 1941 the Supreme Court of the United States decided the case of Parker v. Motor Boat Sales, 314 US 244, 62 S Ct 221, 86 L ed 184. One Armistead was a janitor and handyman for a small store selling boats and maritime equipment. His work was almost entirely on land, but on the occasion in question he went out in a small motor boat on the James River, the boat capsized, and he was drowned. The boat was being operated by a fellow employee on a test run. Armistead's duty at the time was to keep a lookout for hidden objects in the muddy river. His widow was awarded compensation by the Deputy Commissioner under the authority of the Longshoremen's and Harbor Workers' Act, the District Court affirmed, the Circuit Court of Appeals reversed, and the Supreme Court reversed the Circuit Court of Appeals and restored the original award.

As stated by Professor Larson, op cit 413:

> [fol. 127] "This decision by the highest court appeared to scrap the 'local' exception to maritime employment, for the relation to navigation and commerce of a casual and unauthorized ride in a tiny outboard motor boat might seem to approach the vanishing point."

See, also, Western Boat Bldg. Co. v. O'Leary, 198 F2d 409, 414 (9th Cir 1952).

Davis v. Department of Labor, supra, however, decided in the following year, cast a different light on the matter, at least with respect to the application of state compensation laws to maritime injuries. The question there was upon the application of the compensation law of the state of Washington to the case of an injury resulting in death

sustained by Davis, a structural iron worker whose employer was engaged in dismantling an abandoned drawbridge which spanned the Snohomish River, a navigable stream in the state of Washington. Davis was on a barge to which steel from the bridge had been lowered for carriage to a place of storage a short distance away. He was engaged in cutting pieces of steel into proper lengths for loading, and fell or was knocked into the stream and drowned. The Washington commission denied compensation and its ruling was affirmed by the Supreme Court of the state on the authority of *Jensen* and other United States Supreme Court decisions.

Without overruling the *Jensen* case the Supreme Court, in an opinion by Mr. Justice Black, held that the decedent's widow could validly be compensated under the Washington law. The court, after reviewing the confusion in the decisions following in the wake of *Jensen* and the difficulties encountered by employer and employees upon whom pressed "the horns of the jurisdictional dilemma" said:

> [fol. 128] "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." 317 US 253.

The court continued:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great —indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with

broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. §920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." 317 US 256-257.

In the *Davis* case the court did not have the benefit of findings of any agency, either federal or state. Indeed, four Washington state tribunals had rejected the claim. Nevertheless, the court, relying on the presumption in favor of constitutionality of the state statute, reversed the judgment of the Washington Supreme Court.

[fol. 129] The radical departure from precedent in this decision is indicated when it is borne in mind that, as the Supreme Court of Washington said in its opinion (12 Wash2d 349, 121 P2d 365), Davis was working as a stevedore on a vessel in navigable waters loading cargo, and the Supreme Court of the United States had "uniformly held that the 'loading and stowing the ship's cargo' in navigable waters is a 'maritime service,' and that claims for injury incident thereto are exclusively within admiralty jurisdiction" (citing Atlantic Transport Co. v. Imbrovek, 234 US 52, 34 S Ct 733, 58 L ed 1208, 51 LRA (ns) 1157; Southern Pacific Co. v. Jensen, supra; Nogueira v. N.Y., N.H. & H.R. Co., supra; Employers' Liability Assurance Corp. v. Cook, supra).

The scope and impact of the *Davis* decision became more apparent in the light of the decisions in two cases following it which originated in state courts. In Moores's Case, 323 Mass 162, 80 NE2d 478 (1948), the question was whether state compensation could validly be awarded to the claimant, who was injured while engaged in repair

work on a floating dry dock, though his ordinary work was on land. Previously the Supreme Judicial Court of Massachusetts had held in O'Hara's Case, 248 Mass 31, 142 NE 844, in accordance with firmly established law, that the rights and liabilities of parties with respect to injuries received by workmen engaged in repair of a vessel lying in navigable waters (as distinguished from construction work on an uncompleted vessel) are governed by maritime law (Baizley Iron Works v. Span, 281 US 222, 50 S Ct 306, 74 L ed 819 (1930); 2 Larson, op cit §89.25), and that a [fol. 130] dry dock, designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction. The Steamship Jefferson, 215 US 130, 30 S Ct 54, 54 L ed 125; The Robert W. Parsons, 191 US 17, 24 S Ct 8, 48 L ed 73. But, in view of the *Davis* decision, the Massachusetts court felt bound "to include within the 'twilight zone' the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs," and held that the injury was compensable under the State Compensation Law. The judgment was affirmed by the Supreme Court of the United States without opinion on the authority of the *Davis* case, sub nom. Bethlehem Steel Co. v. Moores, 335 US 874, 68 S Ct 233, 93 L ed 417 (1948).

The other state case referred to was Baskin v. Industrial Accident Commission, 89 Cal App2d 632, 201 P2d 549 (1949). There the claimant's employer was engaged in repairing a vessel tied up at a wharf in San Francisco Bay. Claimant's work was almost entirely on land, but he was sent aboard the ship to perform a service in connection with the repair job and was injured. Compensation under the state law was denied, although the *Davis* case was considered by the court. Certiorari was allowed by the Supreme Court of the United States, which vacated the judgment in a per curiam decision and remanded the cause to the District Court of Appeals for reconsideration in the light of the *Moores* and *Davis* cases. 338 US 854, 70 S Ct 99, 94 L ed 523 (1949). On remand the California court reversed its former ruling (97 Cal App2d 257, 217

P2d 733 (1950)), certiorari was again granted, and the Supreme Court, in a memorandum decision, affirmed the [fol. 131] judgment on motion (340 US 886, 71 S Ct 208, 95 L ed 643).

Chief Justice Qua, who wrote the opinion for the court in *Moores's Case*, described the "twilight zone" as "an area of doubt within which the two acts overlap and the injured workman may recover under either of them." He found support for that view in the concurring opinion of Mr. Justice Frankfurter in the *Davis* case, who said "Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act * * * or under a state statute." 217 US 259. Chief Justice Stone, who dissented in the *Davis* case because he thought that the decision was not "within judicial competence" (317 US 260), said: "Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." 317 US 261. Circuit Judge Hutcheson in De Bardeleben Coal Corp. v. Henderson, 142 F2d 481 (5th Cir 1944), referred to "the first come first served" rule of the *Davis* case. Professor Larson says "given a borderline case, and given a presumption of coverage, it follows that all borderline cases are resolved in favor of coverage by the first act under which application is made by the claimant." Larson, op cit 414. This diagnosis, however, seems to be at odds with two United States Court of Appeals decisions which held that, notwithstanding a prior award of compensation by a state tribunal, an award under the federal Act should be sustained, payments there- [fol. 132] tofore made to the workmen pursuant to the state law being credited upon the award made by the Deputy Commissioner. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F2d 968 (4th Cir 1951); Western Boat Bldg. Co. v. O'Leary, supra.

We need not pursue this line of inquiry further. It is pertinent only insofar as it may throw light on one of

the questions in this case, namely, does the "twilight zone" doctrine apply where the injured workman is not seeking redress under any compensation statute but through the medium of an action at law? We think that it does not.

In enacting the Longshoremen's and Harbor Workers' Compensation Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter." Continental Casualty Co. v. Lawson, 64 F2d 802, 805 (5th Cir 1933), quoted in the De Bardeleben Coal Corp. v. Henderson, supra; Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944). The preoccupation of Congress was with the compensation of injured workmen regardless of fault. As Chief Justice Hughes said in the Nogueira case, 281 US 136:

> "When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized."

See to the same effect Davis v. Department of Labor, supra, 317 US 254; Norton v. Warner Co., 321 US 565, 570, 64 S Ct 747, 88 L ed 931. Damage actions were not the concern of Congress save in the single instance of the failure of [fol. 133] an employer to secure payment of compensation as required by §905 of the Act, in which case, as previously stated, the injured workman or his legal representative, if death resulted from the injury, may elect to claim compensation or to maintain an action at law or in admiralty for damages.

In our view, the "twilight zone" was a contrivance—a "quasi-legislative decision," Judge Hutcheson called it in the *DeBardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. See Gilmore and Black, op cit §6-52; 2 Larson, Workmen's Compensation Law, §89.24. It was not recognized in

Pennsylvania Railroad Co. v. O'Rourke, supra, which held that a railroad brakeman, injured when unloading box cars from a car float on navigable waters, could not maintain an action under the Federal Employers' Liability Act, but that his sole remedy was under the Longshoremen's and Harbor Workers' Act. See 344 US 341, footnote 8.

Of the numerous reported decisions which have followed the *Davis* case we have been referred to none where the doctrine was invoked to include a choice between an action for damages under state law and federal compensation except Chappell v. C. D. Johnson Lumber Corp., 112 F Supp 625 (D Oregon 1953), where the identical issue was presented, and the court held that, whether the plaintiff was in an exclusive federal area or within the "twilight zone," since he was not covered under the Oregon Compensation Law he could not maintain a common-law action [fol. 134] and his sole remedy was under the Longshoremen's and Harbor Workers' Act. "The Act," the court said, "is automatic except in the limited circumstances provided for in the act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act." The judgment in this case was reversed by the United States Court of Appeals, but on another point. 216 F2d 873 (9th Cir 1954).

See, also, Scrinko v. Reading Co., 117 F Supp 603, 608. (D NJ 1954).

Based on a suggestion in a scholarly law review article,[2] it is urged by counsel for the plaintiff that, since the Oregon Workmen's Compensation Act provides for an action against an employer who elects not to come under the Act in which the common-law defenses are not available to the defendant, the Act "would apply in toto." That is to say, that in a case such as this where the employer is not under the Act, the provision for an action at law would operate as a substitute for the compensation pro-

[2] "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone" by Robert E. Rodes, Jr., 68 Harv. L. Rev. 637.

vision of the Act. We are not persuaded that such a course would accord with the intent of Congress. Nor do we find anything in the *Davis* case which supports it. Rather, we think that we should take for granted that the *Davis* opinion was intended to be limited to the kind of facts it dealt with and to the class of cases out of which emerged the "jurisdictional dilemma," which it was hoped would be dissipated and vanish in the "twilight zone." If, perhaps, a logical argument could be made for the suggestion, nevertheless, like Chief Justice Qua, we "recognize the futility of [fol. 135] attempting to reason logically about 'illogic'" (Moores's Case, 323 Mass 167), and will not further attempt to illuminate so dark a subject.

We think this a case to which the Longshoremen's and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury. He will not have lost this right through delay because, under §913 (a), (d), the one year's time allowed for filing a claim will not begin to run until the termination of this action.

In Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, supra, where the court sustained an award under the federal Act for an injury to a welder engaged in the repair of a graving dry dock, Circuit Judge Soper, writing the opinion for the court, said with reference to the decision of that court in Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944):

> "* * * In that case we reviewed the decisions in border line cases of a maritime nature and endeavored to show the tendency of the courts, acting in the interest of humanity prior to the passage of the Longshoremen's Act, to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters * * *."

Among the cases exemplifying the more recent tendency we call particular attention to Radcliff Gravel Co. v. Henderson, 138 F2d 549 (5th Cir 1943). The employer in that case was engaged in the same business as the defendant here, namely, the dredging of sand and gravel from the [fol. 136] bed of a navigable lake. The case involved the death by drowning of two employees. Their job was trimming the sand and gravel as it was loaded onto barges to keep it from "forming a pyramid or being cone-shaped." The contract of employment provided that the employer was to furnish transportation to and from the shore and dredge boat. Several employees were drowned when a small boat, propelled by an outboard motor, in which they were being transported by their employer, capsized. Awards under the federal Act to the dependents of two of them were sustained, and this without reference to the *Davis* case or the "twilight zone." The case here is even stronger, for, at the time of his injury, the plaintiff was engaged in loading a barge. "A barge is a vessel within the meaning of the Act even when it has no motive power of its own." Norton v. Warner Co., supra, 321 US 571; Martinson v. State Ind. Acc. Com., supra. The loading of a vessel has a direct relation to commerce and navigation and is not a matter of purely local concern. Martinson v. State Ind. Acc. Com., supra; Pennsylvania Railroad Co. v. O'Rourke, supra; Employers' Liability Assurance Corp. v. Cook, supra; Northern Coal & Dock Co. v. Strand, supra. If it should be said that, notwithstanding the survival of *Jensen* (see the *O'Rourke* case, 344 US 337), decisions rendered during the "maritime but local" era are suspect, it nevertheless remains clear that under the *O'Rourke* and *Motor Boat Sales* decisions the present case comes directly under the terms of the federal Act. Section 903 provides for payment of compensation "if the disability or death results from an injury occurring upon the navigable waters of the United States," and §904 defines the [fol. 137] employer, who is made liable for the compensation, as "an employer any of whose employees are employed in maritime employments, in whole or in part, upon

the navigable waters of the United States (including any dry dock)."

The nature of the plaintiff's regular work, the fact, if it were such, that it was not maritime, is not controlling. "The statute applies," said the court in the *O'Rourke* case, "by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." 344 US 339. Again, "Section 902 (4) requires the employer to pay compensation if he has 'any' employees so engaged. If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.'" 344 US 341-342. The court said further, "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable waters." 344 US 337. In short (absent, at least, a choice between the federal and a state compensation law), the federal Act adopts the familiar rule that in tort cases the admiralty jurisdiction depends upon the locality of the injury. The Admiral Peoples, 295 US 649, 55 S Ct 885, 79 L ed 1633 (1935); O'Hara's Case, 248 Mass 31, 142 NE 844 (1924); Ford v. Parker, 52 F Supp 98 (D Md 1943). Cf. State Industrial Commission v. Nordenholt, 259 US 263, 42 S Ct 473, 66 L ed 933, 25 ALR 1013 (1922).

The following cases tend to support the conclusion at which we have arrived: Avondale Marine Ways v. Henderson, 346 US 366, 74 S Ct 100, 98 L ed 77 (1953); Green v. Simpson & Brown Construction Co., 14 NJ 66, 101 [fol. 138] A2d 10 (1953); Standard Dredging Corporation v. Henderson, 150 F2d 78 (5th Cir 1945); De Bardeleben Coal Corp. v. Henderson, supra; Ford v. Parker, supra; Travelers Ins. Co. v. McManigal, supra.

We think that the judgment below was right and it is affirmed.

[fol. 139]

IN THE SUPREME COURT OF THE STATE OF OREGON

William C. Perry, Chief Justice, George Rossman, Associate Justice, Hall S. Lusk, Associate Justice, James T. Brand, Associate Justice, Harold J. Warner, Associate Justice, Wm. M. McAllister, Associate Justice, Randall B. Kester, Associate Justice, F. M. Serombe, Clerk.

#225-544

Appeal from Multnomah County

HARRY A. HAHN, Appeliant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

—JUDGMENT—January 22, 1958

This cause on November 20, 1957, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It Is Therefore Considered, Ordered and Adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with Marie Erkenbeck as his surety conditioned that said appellant will pay all damages, costs and disbursements on appeal that may be taxed against appellant.

It Is Therefore Ordered that respondent have and recover of and from appellant and his surety its costs and disbursements in this court taxed at $192.00.

It Is Further Ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

[fol. 140]

IN THE SUPREME COURT OF THE STATE OF OREGON

[Title omitted]

Honorable James R. Bain, Judge.

APPELLANT'S PETITION FOR REHEARING

Comes now Appellant and moves the court for a rehearing in the above-entitled cause and alleges the court committed manifest error in the written opinion in this case in the following particulars:

I

In determining it is constitutional to apply State Workmen's Compensation Laws but not an Employer's Liability Act.

II

In determining that employers may ex parte decide the constitutional question.

[fol. 141]

III

In determining that Congress intended to confine the application of State law to Workmen's Compensation Acts.

IV

In determining that the U. S. Supreme Court intended to confine the application of State law to Workmen's Compensation Acts.

V

In failing to give effect to the presumption of constitutionality of a State Act.

Appellant respectfully requests that if the foregoing specifications of error, or any of them, are found to be well taken and a rehearing granted, the court grant time for oral argument.

Wherefore, Appellant prays that a rehearing be granted.

Respectfully submitted,

Dwight L. Schwab, Hutchinson, Schwab & Burdick
Attorneys for Appellant.

[fol. 142]

IN THE SUPREME COURT OF THE STATE OF OREGON

Appeal from Multnomah County

HARRY A. HAHN, Appellant,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.

ORDER DENYING PETITION FOR REHEARING—
February 18, 1958

The court having duly considered the petition of appellant for a rehearing in the above-entitled matter and the court being fully advised thereon,

It Is Hereby Ordered that said petition be and the same is hereby denied.

[fol. 144] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 145]

SUPREME COURT OF THE UNITED STATES

No. 938—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 2, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Oregon is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.